

PRIVATE LAW CONTINUES TO COME TO CAMPUS: RIGHTS AND RESPONSIBILITIES REVISITED

PETER F. LAKE*

INTRODUCTION

Professor Robert D. Bickel and I published our first book, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?*,¹ in 1999. The book was both descriptive and prescriptive. *Rights and Responsibilities* was the culmination of a series of law review articles,² presentations,³ and papers,⁴ and offered a vision of the “facilitator” university.⁵ The book described the burgeoning responsibility to protect students with respect to foreseeable dangers in a campus environment.⁶ Revisiting *Rights and Responsibilities* entails determining whether the description of a general trend towards imposing legal duties of reasonable care on colleges and universities remains largely correct, and whether the book’s prescription—to adopt a “facilitator” orientation towards students—has been viable. Has the law since the book’s publication agreed that an institution should be neither student babysitter

* Mr. Lake is currently a professor of law at Stetson Law School. The author would like to thank Matthew Sperry who offered exceptionally valuable assistance on this article.

1. ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999) [hereinafter *RIGHTS AND RESPONSIBILITIES*].

2. See, e.g., Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide Safe Learning Environment*, 20 J.C. & U.L. 261 (1994).

3. The book was a direct result of a presentation made at the invitation of the University of Notre Dame following publication of the first Bickel & Lake article, *Reconceptualizing the University’s Duty*, in the *Journal of College and University Law*.

4. Several unpublished papers preceded *Rights and Responsibilities*.

5. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 193–201. “Facilitator” universities are universities that seek to create positive student campus life outcomes proactively by guiding their respective student bodies toward making positive lifestyle decisions. *Id.* at 193. While facilitator universities exercise control over the excesses of student life, such as binge drinking or fraternity and sorority (collectively, “Greek”) hazing practices, the facilitator university does not seek ultimate control over all aspects of student life. *Id.* at 195–96. A facilitator university must defer to a student’s informed choice to take some of the inherent risks that makes college life worthwhile, and to this end, the facilitator university can choose to help safely facilitate some risky student activity, such as rock-climbing or canoeing, by offering planning, guidance, or instruction. *Id.* at 195.

6. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 159–221.

nor bystander?⁷

Citations to *Rights and Responsibilities* and predecessor articles have become common in legal literature and the press.⁸ Moreover, *Rights and Responsibilities* has had a significant impact on some college's and university's policies.⁹ Nonetheless, the book has had only a limited impact on reported legal decisions. Only one court has cited a predecessor article to *Rights and Responsibilities*,¹⁰ even though there have been several decisions since 1999 that are consistent with themes in the book. The more significant impact *Rights and Responsibilities* has had so far has been its role in furthering the rise of a risk management culture in American colleges and universities.¹¹

7. In loco parentis is a legal relationship between schools and students that was generally observed prior to 1960. See BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 17. An analogy can be drawn between babysitting and in loco parentis in that in loco parentis also involved a delegation of parental power from a student's parents to a third party, in this case the student's university. *Id.* at 20–22. This delegation of parental power permitted the university to control and discipline the student to the same extent as the student's parents. *Id.* Following the immediate demise of in loco parentis, courts entered a new era of legal protectionism of colleges based on a vision of student life as distinct from academic pursuits. *Id.* at 49. The college became, in our terms, a *bystander* to student life, such that legal duty would only be owed in special circumstances. *Id.* at 104.

8. E.g., Kathleen Connelly Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 111 (2003); Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 105 n.61 (2002); Kerri Mumford, Note, *Who is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POLICY 737, 743 n.45 (2001); *Articles, Notes, and Commentary*, 29 J.L. & Educ. 521, 545 (2000).

9. DePauw University, Texas A&M University, and the University of Arizona have all adopted or modified policies in response to themes of the book. See Peter F. Lake & Holiday Hart McKiernan, *The Depauw Greek Community: An Assessment of the Environment*, available at <http://www.depauw.edu/univ/coalition/assessment.asp> (last visited May 8, 2005); TEXAS A&M UNIV., DEPT. OF STUDENT AFFAIRS, *Risk Management and Organizational Development*, available at <http://studentactivities.tamu.edu/risk/facilitator.htm> (last visited May 8, 2005) [hereinafter Texas A&M Policy]; Kevin A. Cranman & Paul J. Ward, *Review of Robert Bickel & Peter Lake's The Rights and Responsibilities of the Modern University*, available at <http://www.asu.edu/counsel/brief/bookreview.html> (last visited May 8, 2005). In addition, the book has been featured twice at National Department of Education meetings in meet-the-author-sessions. U.S. DEPT. OF EDUC., *The U.S. Department of Education's 18th Annual National Meeting on Alcohol and Other Drug Abuse and Violence Prevention in Higher Education*, available at <http://www.edc.org/hec/natl/2004/detailedagenda.html> (last visited May 8, 2005); U.S. DEPT. OF EDUC., *Deep in the Heart of Prevention: Collaboration for Accountability and Effectiveness*, available at <http://www.edc.org/hec/natl/2003/detail.html> (last visited May 8, 2005).

10. *Gross v. Nova S.E. Univ.*, 758 So. 2d 86 (Fla. 2000). *Gross* was in turn used to support a student plaintiff's argument that the defendant university had a duty to protect her in *McLean v Univ. of St. Andrews*, 2004 ScotCS 45 (2004) (Scot.) at ¶ 16, available at http://www.scotcourts.gov.uk/opinions/A1143_01.html (Feb. 25, 2004) (citing *Gross*, 758 So. 2d 86).

11. For the better part of two decades, most Greek organizations have focused heavily on risk management to try to manage legal liability. See FIGP, INC., *Risk Management Manual*, available at <http://www.sigmapi.org/pdfs/manuals/figp.pdf> (last visited May 8, 2005) [hereinafter FIGP Manual]. Today many universities put specific emphasis on developing risk management programs. See, e.g., Texas A&M Policy, *supra* note 9; CAL. STATE UNIV. BAKERSFIELD, *California State University Bakersfield Risk Management Policy*, available at <http://www.csusbak>

Rights and Responsibilities has not been a common tool in litigation. College and university lawyers apparently rarely cite *Rights and Responsibilities* in briefs or arguments, perhaps because the book would not support every argument an institution could make in litigation. Whereas college and university lawyers generally are familiar with the book, judges and personal injury lawyers may have difficulty locating *Rights and Responsibilities*. It is much easier to access law review articles in legal research than academic books. Thus, *Rights and Responsibilities* remains descriptively valid of legal decisions only to the extent that it describes the principles animating recent cases. *Rights and Responsibilities*, however, has demonstrated some prescriptive success in that it has influenced policy makers, colleges, and universities in the development of safety and risk management programs.¹²

Part I of this article discusses cases decided since 1999 that deal with central issues of legal duty. The major focus of *Rights and Responsibilities* was describing the evolution of the law of legal duty in higher education. It has become apparent that the most significant cases in this regard are those involving student alcohol use.¹³ *Rights and Responsibilities* was not a book devoted to college alcohol issues, as such.¹⁴ Yet, it is increasingly apparent that the battleground over competing visions of the modern university is the high-risk alcohol culture and its epidemic primary and secondary effects.¹⁵ Litigation over injuries fueled by alcohol drive college and university safety law today.¹⁶ Many of the recent alcohol cases involve Greek organizations.¹⁷ Courts continue to hold Greek organizations responsible for foreseeable danger to members and others.¹⁸ There are also some

edu/BAS/srm/EHS/Forms/pdf/riskpolicy.pdf (July 1, 1999) [hereinafter Cal. State. Bakersfield Policy]. Thus, for example, Texas A&M University became a national leader following its tragic bonfire incident by establishing specific risk management principles to govern student activities and student life. See TEXAS A&M UNIV. DEPT. OF STUDENT ACTIVITIES, *Student Organization Manual*, available at <http://orgmanual.tamu.edu/manual.PDF> (last visited May 8, 2001).

12. See *supra* note 9.

13. The non-alcohol cases, with exception of the non-alcohol cases discussed below, are not particularly significant; most represent the routine application of typical private law categories, more often than not tort law. These cases show clearly and consistently that private law has come to campus; *Rights and Responsibilities* described a trend towards the mainstreaming of college law. See also Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 1-3 (1999) (describing long-term trends in tort law that parallel developments in higher education law).

14. Nonetheless, a portion of the book is devoted specifically to alcohol issues and many of the cases discussed involve injuries flowing from high-risk alcohol use. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 205-10. The book uses the term "alcohol abuse" to refer to alcohol issues; today I prefer the term "high-risk alcohol use." *Id.* at 205.

15. Almost half of all college students report significant amounts of binge drinking. See *infra* note 39 and accompanying text.

16. See, e.g., *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000); *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999).

17. See, e.g., *Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998).

18. E.g., *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757. *Contra Garofalo*, 616 N.W.2d 647; *Barran*, 730 So. 2d 203.

significant cases that do not involve alcohol and are relevant to issues of duty and reasonable care in higher education law.¹⁹ Importantly, as “No-duty” arguments begin to fail in court,²⁰ it is increasingly necessary for college and university lawyers to turn to other arguments such as causation and plaintiff fault to manage the litigation boom.²¹

Part II discusses some future trends. First, the article briefly discusses the continuing rise of risk management cultures at colleges and universities in recent times. *Rights and Responsibilities* did not cause the rise in risk management cultures; yet, there is a profound interrelationship between the book and the continued development and refinement of the concept of college risk management. The modern college or university now attends to foreseeable risks as a matter of good business, not just for litigation avoidance.²² Second, Part II also discusses the need for further development of the facilitator model as set out in *Rights and Responsibilities*. With the benefit of hindsight, it is clearer than ever that *Rights and Responsibilities* and the facilitator model require further development in at least two areas. One area concerns student process systems.²³ Today, safety is intimately connected to the efficacy of student process systems.²⁴ These systems are failing and need attention.²⁵ Additionally, *Rights and Responsibilities* and its facilitator model were deeply animated by active risks posed to students by the students’ own behavior, the behavior of other students, and non-students; and to a lesser extent, passive risks created by conditions on or near campus.²⁶ Although *Rights and Responsibilities* did attend to some wellness issues,²⁷ it did not focus upon the ever-growing range of student wellness issues including student suicide, depression, anxiety, cutting, etc.²⁸ We are now on the leading edge of a new generational set of student concerns. There will be a rise in concern for—and thus ultimately litigation over—issues related to student wellness. The future of the facilitator model depends on attending to these new risks.

19. *E.g.*, *Jain v. Iowa*, 617 N.W.2d 293 (Iowa 2002); *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045 (Me. 2001); *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

20. *E.g.*, *Stanton*, 773 A.2d 1045.

21. One major implication of *Rights and Responsibilities* is that as courts continue to acknowledge that colleges and universities owe a duty of reasonable care to protect students from foreseeable danger, litigation will begin to turn toward such issues as compliance with the reasonable person standard of care, causation, appropriate damages, and plaintiff fault arguments. *See* BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 105–09.

22. For example, the University of Delaware has found that a risk program has reduced alcohol related injuries, vandalism, and fraternity problems without negatively impacting admissions. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 212–13.

23. *Id.* at 190–92.

24. *Id.*

25. *Id.* at 190–91.

26. *Id.* at 5.

27. *Id.* at 15–16, 194–95.

28. In 2004, the American College Health Association released figures stating that the number of students reporting a diagnosis of depression had jumped almost fifty percent from 2000 to 2004. Eric Hoover, *More College Students Report Diagnoses of Depression*, *CHRON. HIGHER EDUC.*, Dec. 10, 2004, at A28.

I. RECENT CASES INVOLVING THE LEGAL DUTY OF COLLEGES AND UNIVERSITIES FOR STUDENT SAFETY AND OTHER ISSUES RELATING TO LEGAL LIABILITY.

Rights and Responsibilities had the benefit of fortuitous timing. There were several extremely significant state supreme court decisions consistent with the facilitator model decided months after *Rights and Responsibilities* was published.²⁹ *Rights and Responsibilities* did not cause this sequence of cases. *Rights and Responsibilities* was designed to provide the best approximation of national case law and described many trends in private law that were nearly certain to come to campus.³⁰ The timing—and even the consistency—of the cases' messages were coincidence. Thus, a word of caution to advocates or detractors of the “facilitator” model: no single case or single set of cases should be interpreted as either “proving” or “disproving” the central themes of *Rights and Responsibilities*.³¹ It will take many years, and perhaps an entire generation of cases, to determine whether *Rights and Responsibilities* can stake a claim as a strong descriptor of modern higher education law.

There are many reasons to believe that *Rights and Responsibilities* will remain an accurate descriptive model for case law involving college and university student safety. Perhaps the single greatest trend that continues in the law of torts is the consolidation of the paradigm of reasonableness.³² “No-duty” rules in tort law have become particularly suspect: while courts do not take the position that duty is universally owed,³³ exceptions continue to eviscerate “No-duty” rules.³⁴ One assertion of *Rights and Responsibilities* will likely remain accurate and gain additional support over time: “No-duty” rulings in college student safety cases will diminish, although it is unlikely that “No-duty” rulings will completely disappear.³⁵ Indeed, there already has been at least one court ruling that a university owed no duty to a student,³⁶ and there will likely be others. In an earlier time, the concept of duty was taught as an important protective litigation avoidance norm.³⁷ Today, courts increasingly re-imagine former “No-duty” arguments as

29. *E.g.*, *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999). The cases impose duties upon the universities for student welfare.

30. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 179–201.

31. *Rights and Responsibilities* focuses primarily on advocating a “facilitator” model of university governance. *Id.* at 216. *See also supra*, note 5 and accompanying text (describing the facilitator model).

32. *See* RESTATEMENT (THIRD) OF TORTS § 29 (Tentative Draft No. 3, 2003); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 663 (1992) (proscribing descriptions of tort liability based upon reasonableness).

33. Schwartz, *supra* note 32, at 659–63 (1992).

34. *E.g.*, *Knoll*, 601 N.W.2d 757; *Coghlan*, 987 P.2d 300.

35. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 12.

36. *Ex Parte Barran*, 730 So. 2d 203, 207–08 (Ala. 1998).

37. Many legal scholars were educated under classic Prosser torts treatises and casebooks that acknowledged the erosion of no duty rules but also emphasized the necessity of using duty as a litigation limiting tool. *See, e.g.*, W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 56, 373–75 (5th ed., West 1984).

plaintiff-fault arguments or causation arguments, among other things.³⁸ Thus, a long term restructuring of higher education litigation strategies is inevitable if the current and well-established trends in tort law continue.

A. College and University Duty and High-Risk Alcohol Use

By far the most significant pressure on student safety issues at colleges and universities today is high-risk alcohol use.³⁹ Colleges and universities are increasingly sensitive to high-risk alcohol use and strategies to combat high-risk behavior.⁴⁰ Even in cases that do not specifically involve alcohol, colleges and universities are sensitive to the implications of case law related to the alcohol problem.⁴¹ Thus, *Rights and Responsibilities* has been tested in cases that involve alcohol as well as cases that effect litigation over alcohol related injuries.⁴²

Two decisions in 1999, *Knoll v. Board of Regents of the University of Nebraska*⁴³ and *Coghlan v. Beta Phi Fraternity*,⁴⁴ underscore courts' increasing willingness to acknowledge the legal duty of institutions for risk to students arising out of the high-risk alcohol culture in which the students live. These cases held that the respective universities have a legal duty to use reasonable care to prevent injuries to students arising out of events where alcohol is served and available.⁴⁵ Both cases demonstrate that the path-breaking decision in *Furek v. University of Delaware*,⁴⁶ which imposed a legal duty upon the college or university to protect

38. See, e.g., *Barran*, 730 So. 2d 203.

39. See HIGHER EDUC. CTR., *National College Alcohol Study Finds College Binge Drinking Largely Unabated, Four Years Later*, available at <http://www.edc.org/hec/thisweek/tw980910.html> (Sept. 10, 1998) (discussing Henry Weschler et al., *Changes in Binge Drinking and Related Problems Among American College Students Between 1993 and 1997*, available at http://www.hsph.harvard.edu/cas/Documents/97_survey-surveyReport/ (last visited May 8, 2005)).

40. Peter F. Lake & Joel C. Epstein, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 612–13, 618–21 (2000).

41. E.g., *Saelzler v. Advanced 400 Group*, 23 P.3d 1143 (Cal. 2001) This case was not a university case at all and dealt primarily with the nexus between an assault on the plaintiff that occurred on the defendant's property and whether the defendant's lack of security on the property was the cause of the plaintiff's injuries. *Id.* at 769, 772. This case did not involve alcohol, however, universities in California filed an amicus brief in the case arguing in favor of the defendant. *Id.* at 766. For a further discussion of the facts of this case see *infra* note 339–359 and accompanying text.

42. See, e.g., *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999); *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Jain v. Iowa*, 617 N.W.2d 293 (Iowa 2002); *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045 (Me. 2001); *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002). All of these cases are pertinent to testing the facilitator model advocated by *Rights and Responsibilities* in the context of alcohol-related injuries and injuries not involving alcohol.

43. 601 N.W.2d 757.

44. 987 P.2d 300.

45. *Knoll*, 601 N.W.2d at 764–65; *Coghlan*, 987 P.2d at 314.

46. 594 A.2d 506 (Del. 1991).

students from foreseeable hazing and alcohol injuries, is not anomalous.⁴⁷ *Knoll* and *Coghlan* also illustrate that the traditional trinity of “No-duty” college and university rulings of *Beach*,⁴⁸ *Bradshaw*,⁴⁹ and *Rabel*⁵⁰ are no longer controlling authority in a significant number of jurisdictions.⁵¹

Knoll and *Coghlan* are pronouncements from the supreme courts of Nebraska and Idaho, respectively. Both high courts held that a duty was owed, but not that *liability* always follows from the existence of that duty.⁵² To that extent, these cases represent a continuing trend to recognize a legal duty of institutions to protect students from foreseeable danger, and also represent the parallel trend not to assume that legal duty always leads to liability, or significant liability.⁵³

This point is illustrated by related decisions from the Indiana Supreme Court.⁵⁴ In *L.W. v. Western Golf Ass’n*, a student at Purdue University was raped after returning home from a bar.⁵⁵ The *L.W.* court recognized that there had been previous personal safety issues at the university housing where the student lived.⁵⁶ There was even an attempted act of violence directed at another female in the same housing unit.⁵⁷ The Indiana Supreme Court noted that there was evidence that life at the residence building was not entirely safe.⁵⁸ The court, however, distinguished the general prior incidents that had occurred from the incident that specifically occurred in *L.W.*⁵⁹ Crucially, the student was living in an environment where there had been no rape or serious sexual assault.⁶⁰ The *L.W.* court used the totality of the circumstances test to determine foreseeability for purposes of determining duty.⁶¹ Although the totality of the circumstances test does not require an identical or similar incident to the tort in question for a finding of foreseeability, the *L.W.* court found that while the housing situation was “childish” and “deplorable at times,”

47. *Id.* at 522–23.

48. *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986).

49. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

50. *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987).

51. See BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 49–104.

52. *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757, 765 (Neb. 1999); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 314 (Idaho 1999).

53. See *L. W. v. W. Golf Ass’n*, 712 N.E.2d 983 (Ind. 1999); *Delta Tau Delta v. Johnson*, 712 N.E.2d 968 (Ind. 1999). A third case, *Vernon v. Kroger Co.*, 712 N.E. 2d 976 (Ind. 1999), reinforced that rules applied in college cases apply in commercial contexts and vice versa.

54. *L. W.*, 712 N.E.2d 983; *Delta Tau Delta*, 712 N.E.2d 968; *Vernon*, 712 N.E. 2d 976.

55. *L.W.*, 712 N.E.2d at 984. A fellow tenant of the victim's resident hall raped the victim. *Id.* The victim was required to live in this building pursuant to a scholarship program. *Id.* The victim had become intoxicated at a bar and was helped back to her room by several individuals. *Id.* Upon returning to her room, the victim passed out from intoxication. *Id.* A short while later, one of the individuals who had helped the victim back from the bar raped the victim while she was unconscious. *Id.*

56. *Id.* at 985.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 984–85.

there was insufficient evidence of prior dangerous activity for L.W.'s rape to be foreseeable.⁶²

In *Delta Tau Delta v. Johnson*, however, the Indiana Supreme Court recognized that there were sufficiently similar prior incidents of sexual misconduct to support foreseeability as an aspect of legal duty owed to a student.⁶³ These two cases from Indiana indicate that there are sometimes insufficient predicate facts to create a legal duty to a tenant or business invitee.⁶⁴ Moreover, duty does not necessarily mean liability.⁶⁵ Courts since the era of *Beach*, *Bradshaw*, and *Rabel* have implicitly recognized a key argument from *Rights and Responsibilities*—a college's or university's duty to students does not equal insuring student safety.⁶⁶

The *Knoll* case involved an incident (although not a sexual assault) at a fraternity.⁶⁷ A student at the University of Nebraska was involved in a hazing incident that resulted in very serious injury.⁶⁸ During a pledge induction process, members of a fraternity met the plaintiff student at a university building on campus and brought the student to an off-campus, but university regulated, fraternity house.⁶⁹ The injured student consumed hard liquor and beer over a several hour period.⁷⁰ At one point the student was handcuffed to a radiator.⁷¹ The student managed to become free of the handcuffs and attempted an escape out an upstairs window.⁷² During the attempted escape, the student suffered serious injuries in a fall.⁷³

The critical issue in *Knoll* revolved around the fact that the injuries ultimately took place at a premise not owned or operated by the university.⁷⁴ Although the fraternity house was not on university-owned property, it was subject to the student code of conduct, which created sanctions for certain forms of dangerous conduct.⁷⁵

62. *Id.* at 985.

63. *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973–74 (Ind. 1999). In *Delta Tau Delta*, the victim brought suit against local and national offices of a fraternity arising out of a sexual assault at a fraternity house. *Id.* at 970. The victim attended a party at a fraternity house where she met up with an alumnus of the fraternity. *Id.* Near the conclusion of the party, the victim sought a ride home, and the alumnus offered the victim a ride after he "sobered up." *Id.* The two went to a separate room within the fraternity house to wait for the alumnus to regain his sobriety, and during this time, the alumnus locked the victim into the room and sexually assaulted her. *Id.* Applying a totality of the circumstances test, the court found that the victim's assault was foreseeable because of prior instances of sexual assault within the defendant fraternity's house. *Id.* at 973.

64. *Compare L. W.*, 712 N.E.2d 983, with *Delta Tau Delta*, 712 N.E.2d 968.

65. *E.g., L. W.*, 712 N.E.2d 983.

66. *E.g., Delta Tau Delta*, 712 N.E.2d 968.

67. *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757, 760 (Neb. 1999).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 761–62.

75. *Id.* at 764.

The Nebraska Supreme Court, though, did not focus upon the regulation of the off-campus property, but focused instead on the fact that the incident began on university property.⁷⁶ In deploying the totality of the circumstances test—the virtually identical test employed by other courts⁷⁷—the Nebraska Supreme Court relied heavily upon the fact that there had been prior hazing incidents where students had been snatched and removed from buildings or otherwise coerced into high-risk alcohol consumption or other harassing hazing activities.⁷⁸ From this the court concluded “the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University’s property, and the harm that naturally flows therefrom.”⁷⁹

In so holding, the court made it clear that events leading to an eventual injury off campus do not themselves have to be injurious or even seriously dangerous independent of the resulting injury.⁸⁰ Importantly, off-campus injuries to students sometimes occur when students are lured from a university premise to an off-premise location. If the *Knoll* reasoning is correct, there could be a sufficient link—subject to possible proximate cause limitations—between almost any off-campus event that initially commences on-campus and the ultimate injury that arises from that event. Therefore, whether a college or university has a duty to a victim may hinge upon where an attacker commences contact with the victim, even if the initial contact itself is neither harmful, nor portends harm. In this sense, duty may lie in the hands of an attacker.

The fact that the existence of a duty in a given case may turn upon circumstances largely beyond the control of the institution leads to an extremely important point. Danger has a way of spilling from one location to several others in a chain reaction. A risk may result from a series of specific events that thus may or may not trigger a legal duty; it is often impossible to predict how harmful events will unfold. After *Knoll*, a college or university must often behave as if duty were owed, even if in actuality the college or university has no duty. A facilitator institution does the same. A college or university should act *as if* it were accountable under a reasonable person standard for foreseeable danger to students, whether or not it actually will be held accountable in a court of law. For example, tests like the totality of the circumstances test make it difficult for a student or administrator to predict in advance whether a duty will be owed in a given fact pattern. Hence, despite the continued existence of the law of duty, colleges and universities cannot heavily rely upon duty case law to deduce the limits of responsibility a priori. The law of duty in higher education law no longer guards the gates of the courthouse as it did in *Palsgraf*.⁸¹ Duty law now serves the primary function of being a major factor in limiting or eliminating liability post

76. *Id.*

77. *E.g.*, *L. W. v. W. Golf Ass’n*, 712 N.E.2d 983, 984–85 (Ind. 1999).

78. *Knoll*, 601 N.W.2d at 764–765.

79. *Id.* at 765.

80. *Id.* at 762.

81. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

hoc, not in keeping cases involving physical injury to students occurring within some proximity to campus life blocked from the courthouse door. For instance, the line between *L.W.* and *Delta Tau Delta* is ever so thin—constructive notice of a single sexual assault may be enough to tip the former into the latter. This is a feature of most cases involving duty issues, not just those cases involving landowner duty.⁸²

In this vein, *Knoll* made clear that it was not essential that a specific prior incident occur with respect to a specific fraternity. Using the totality of circumstances test, the Nebraska Supreme Court was willing to look at prior acts of sneaking and grabbing of students and also prior, but not identical, criminal activity in the fraternity community.⁸³ Crucially, the court made it clear that “prior acts need not have occurred on the [specific] premises [where the injury occurred].”⁸⁴ Sufficiently similar incidents occurring in a nearby community can give rise to an inference that such criminal activity is foreseeable on a nearby landowner’s property.⁸⁵

The *Knoll* court did address the fact that the university had asserted some control over fraternity houses by regulating them under the student code.⁸⁶ Nonetheless, it appears from the court’s reasoning with respect to landowner duties that the mere fact that control was or was not exercised over an off-campus property would not be dispositive.⁸⁷ The court included the exercise of university control over students as one of the factors in the totality of circumstances test, but the court did not find university control to be the only—or even most important—factor in determining liability.⁸⁸ Thus, one critical implication of *Knoll* is that it does not hold that regulating off-campus behavior imposes duty. This is not an “assumed duty” case. The obverse is also certainly not true: not regulating off-campus behavior does not insulate an institution from liability. One of the implications of bystander-era cases⁸⁹ was that assuming a duty—for example, regulating off-campus behavior—would increase an institution’s liability.⁹⁰ The Nebraska Supreme Court, by reversing the trial court’s grant of summary judgment for the University of Nebraska, suggests, to the contrary, that the failure to enforce regulations involving off-campus behavior could be a factor under the totality of the circumstances test.⁹¹ The result ultimately turns on what a

82. *Knoll*, 601 N.W.2d at 764.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See Id.*

88. *Id.* at 764–65.

89. Bystander era cases refer to a period during the 1970s and 1980s where the courts cast universities as “bystanders” to student life. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 49. Essentially, the courts found that universities were “bystanders” to non-educational student life, and that universities therefore owed no legal duties to prevent injuries students inflicted upon each other. *Id.* at 49–50, 63–65.

90. *See Id.* at 65.

91. *See Knoll*, 601 N.W.2d at 764–65.

reasonable person would do with respect to business invitees considering all the circumstances.⁹² *Knoll* may be the first American case to imply that not being proactive is *itself* a factor in creating duty.⁹³ Certainly, a facilitator college or university recognizes that a small amount of prevention may be a cure for potential liability.⁹⁴

In retrospect, it seems that the University of Nebraska's strong and proactive concern for student behavior off-campus (and certain safety measures that were taken, such as working security phones) may have ultimately resulted in minimal *liability* to the university.⁹⁵ By way of settlement with the university, the injured student received only \$25,000.⁹⁶ This relatively small sum in the range of tort injury settlements⁹⁷ seemed related to the fact that the institution had regulated pledge sneak events and had offered security phones, one of which the injured student had admitted that he had chosen not to use because he wanted to participate in the event.⁹⁸

The other decision establishing the duty of a college or university to use reasonable care to protect students in high-risk alcohol situations is *Coghlan v. Beta Theta Phi Fraternity*.⁹⁹ In *Coghlan*, Rejena Coghlan, a freshman, was injured during rush week.¹⁰⁰ Rush week had developed into a highly planned event sanctioned by the university and performed in conjunction with Greek organizations.¹⁰¹ One of the specific concerns during rush week was underage drinking.¹⁰² To protect students from underage drinking, several policies were created.¹⁰³ One of those policies required sororities to assign a "guardian angel" to any underage student that sought induction into a sorority.¹⁰⁴ The "guardian angel" was a member of the sorority to which the student wished to belong.¹⁰⁵ The "guardian angel" was to shadow the student during rush week, particularly during evening activities.¹⁰⁶ Advisors from the Greek system and the university jointly

92. *Id.* at 761–65.

93. *See id.* at 764 (indicating that the university was aware of hazing and created regulations prohibiting hazing, but that the university did not enforce those regulations off-campus).

94. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 212.

95. Peter F. Lake, *Tort Litigation in Higher Education*, 27 J.C. & U.L. 255, 274–75 (2000) [hereinafter *Tort Litigation*].

96. *Id.* at 275.

97. The \$25,000 *Knoll* settlement is relatively small when compared to a \$6 million settlement paid by the Massachusetts Institute of Technology ("MIT") to the family of Scott Krueger, an MIT student, for his death from alcohol poisoning. HIGHER EDUC. CTR., *MIT Settlement Makes Other Colleges and Universities Take Notice*, available at <http://www.edc.org/hec/press-releases/000915.html> (Sept. 15, 2000).

98. Lake, *Tort Litigation*, *supra* note 95, at 274–75.

99. 987 P.2d 300 (Idaho 1999).

100. *Id.* at 304–05.

101. *Id.* at 305

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

monitored the evening events, which were a series of alcohol parties.¹⁰⁷ Ms. Coghlan managed to obtain alcohol at two parties entitled “Jack Daniels’ Birthday” and “Fifty Ways to Lose Your Liver”—and became so intoxicated that she later fell and suffered injuries.¹⁰⁸ Another sorority sister—not her assigned “guardian angel”—had escorted Coghlan from a party and put her into bed in a sorority house, but this did not prevent Coghlan from sustaining permanent injuries by later falling thirty feet from the sorority’s fire escape.¹⁰⁹

Idaho’s Dram Shop Act is highly protective of servers: it protects a server from being sued by a person who voluntarily consumes alcohol from that server, even though the individual who consumes the alcohol is underage.¹¹⁰ As a result of this loophole in the Idaho Dram Shop Law, the lawsuit against the fraternity defendants was dismissed as they were deemed servers.¹¹¹ The university, however, was not a server and, therefore, did not qualify for Idaho Dram Shop immunity.¹¹²

A major issue in the case was the nature and source of legal duty, if any, owed by the university to the student.¹¹³ The *Coghlan* court correctly noted that the student-university relationship is not itself a special relationship imposing an affirmative duty.¹¹⁴ Finding it unnecessary to discuss issues related to landowner duties, the court determined that the injured party’s pleadings were sufficient to create an issue regarding an assumption of duty toward Coghlan.¹¹⁵ The *Coghlan* court pointed out that there were university employees at parties who were charged with supervisory responsibilities, and that there were allegations that the employees either knew or should have known that Coghlan was drunk and required reasonable care to protect her from injury.¹¹⁶ The matter was remanded for further determinations with respect to the issue of voluntary assumption of duty.¹¹⁷

Does *Coghlan* mean that the best course of action for college and university officials is to decline to participate in supervision of student events? The answer is almost certainly no. For one thing, substantial interaction with student life and Greek affairs is well entrenched in modern student affairs.¹¹⁸ It also seems unrealistic as a college or university business practice to disconnect from risk management with student groups and organizations.¹¹⁹ Moreover, managing the classroom environment and creating conditions for academic success require a

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 306–07.

111. *Id.* at 306.

112. *Id.* at 312.

113. *Id.* at 310–12.

114. *Id.* at 311–12.

115. *Id.* at 312.

116. *Id.*

117. *Id.* at 314.

118. *See, e.g., Id.* at 300; *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757, 761 (Neb. 1999); BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 150–53.

119. For instance, university risk management efforts reduced the plaintiff’s settlement in *Knoll Lake, Tort Litigation*, *supra* note 95, 274–75.

whole life-learning strategy and the creation of a reasonably safe environment.¹²⁰ Thus, it seems unlikely that the modern college or university would select a strategy of disengagement from the Greek system even if *it* were legally advisable.

Such a strategy would also be legally unsound. As in the *Knoll* case, danger has a nasty habit of transporting on and off premises: the failure to attend to a risk that occurs near campus or at a student off-campus event is as likely to create college or university liability as a failure to attend to a risk on campus.¹²¹ Hypothetically, the plaintiff in the *Knoll* case might have returned to a dormitory and fallen in or near the dormitory, triggering potential landowner duties.¹²² Landowner duty analysis in *Coghlan* might have created a foundation for that court's conclusion that the university shared responsibility for the injuries to the plaintiff.¹²³ Crucially, it may be impossible to find factual situations that do not create a triable issue of fact on whether a duty has been assumed. The modern college or university is so interactive in student life—and offers so many interlocking business activities concentrated in time and space¹²⁴—that any time a student is injured on or near campus, a college or university employee is probably involved to an extent that a fact issue on assumed duty likely exists.

Coghlan also illustrates a significant defect in some states' underage drinking and high-risk alcohol activity rules. The Idaho Dram Shop Act is too protective of servers.¹²⁵ Categorical immunity for a server from suits (*especially*) by underage students who have voluntarily consumed is simply too broad a rule and, as a matter of policy, unsupportable if we have any hope of combating underage drinking risks. A facilitator college or Greek group recognizes that it shares some responsibility for high risk and underage drinking—the mere fact that the participation by students has an element of voluntarism does not absolve a facilitator from responsibility.¹²⁶ This sort of statutory rule is not consistent with the facilitator model.¹²⁷

Similarly, the Alabama Supreme Court took an exceedingly disappointing step backwards in 1998. In *Ex parte Barran*,¹²⁸ the Alabama Supreme Court ruled that a student who voluntarily participated in hazing activities might be barred from suit against other parties because the student voluntarily participated in the hazing process.¹²⁹ The case is significantly out of line with the dominant approach to

120. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193–94.

121. *Knoll*, 601 N.W.2d at 764.

122. The facts of *Knoll* are located at *Knoll*, 601 N.W.2d at 760–61.

123. The *Coghlan* Court did not reach landowner duty analysis because it found that the defendant university assumed a duty to the plaintiff. *Coghlan v Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999).

124. *See, e.g., Coghlan*, 987 P.2d at 300; *Knoll*, 601 N.W.2d at 761; BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 150–53.

125. *Coghlan*, 987 P.2d at 306–07.

126. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 195.

127. For a description of the facilitator model, *see supra* note 5.

128. *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998).

129. *Id.* at 208.

fighting hazing, which bars the assumption of risk defense as a matter of policy.¹³⁰ The decision to penalize a student who voluntarily participates in hazing by barring a hazing related claim effectively shields other students who have perpetrated hazing. By abolishing consent defenses in hazing cases, lawsuits may proceed even from parties who have voluntarily participated in hazing. This rule can have a significant impact in ending voluntary behavior that is utterly inappropriate, uneconomical, antisocial or otherwise extremely dangerous, or involves minors.¹³¹

The messages from *Knoll* and *Coghlan* were echoed in another case that never made it to final adjudication. Scott Krueger died as a result of alcohol poisoning at the Massachusetts Institute of Technology ("MIT").¹³² As a result of Scott Krueger's death, MIT settled with the Krueger family for \$6 million, a public apology, and the undertaking to perform various activities and policy changes.¹³³ The settlement sent shock waves through the education community in part because the size of the settlement was unusually large.¹³⁴ There is much speculation as to what occurred and why MIT settled because the matter was never given the chance to develop as a full matter of record in a court of law. Nonetheless, the case is indicative of a new climate of concern for potential success in courts of law on the issue of the legal duty of colleges to protect students from foreseeable danger in high-risk alcohol situations.¹³⁵

Not all student alcohol cases have involved only university defendants.¹³⁶ On

130. See Dara Aquila Govan, "Hazing Out" the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 689-91 (2001).

131. These cases illustrate a continuing issue. Many courts seem to feel that the voluntary drinker has crossed a significant moral or social boundary and therefore, is undeserving of any recovery. It is true that there will be some individuals whose behavior is so unpredictable, unforeseeable, or so unpreventable that when coupled with a college or university exercising reasonable care, these students are undeserving of any significant recovery. Nonetheless, courts should be cautious to apply such a rule categorically because the effect is to create a legal climate in which others may take advantage of the negligence of victims and use that legal rule as an opportunity for gross injustice.

132. HIGHER EDUC. CTR., *MIT Settlement Makes Other Colleges and Universities Take Notice*, available at <http://www.edc.org/hec/press-releases/000915.html> (Sept. 15, 2000).

133. *Id.*

134. *Colleges and Universities Nationally Cope With Concerns About Students' Alcohol Use*, DEPAUW MAGAZINE, available at http://www.depauw.edu/pa/magazine/summer_2003/feature_3.html (last visited May 8, 2005).

135. A similar situation occurred when Ferrum College recently settled with respect to a student suicide. In the public settlement, Ferrum College admitted a shared responsibility with respect to suicide risk. G. Jeffrey MacDonald, *Reaching Out to Students*, USA TODAY, Dec. 6, 2004 at 7D. This case is particularly notable because the law of college student suicide is still in its relative infancy and presently awaits further determinations from the Massachusetts judicial system in the matter of *Elizabeth Shin v. MIT* (a matter in which a student burned herself to death in a suicide). See Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES, Apr. 28, 2002, § 6 (Magazine), at 57; Peter F. Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 126 n.3 (2002).

136. *E.g.*, *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999); *Knoll v. Bd. of Regents of Univ. of Neb.*,

the whole, litigation against fraternities and fraternity members remains strong.¹³⁷ There appears to be no significant let-up in a judicial orientation (that began in the 1980s) to hold Greek organizations potentially responsible for injuries caused in the context of Greek organizational functions.¹³⁸ One of the most notable recent cases involving Greek organizations is *Garofalo v. Lambda Chi Alpha Fraternity*.¹³⁹ *Garofalo* involved a fraternity pledge named Matt Garofalo, who died after consuming large quantities of alcohol at the fraternity house.¹⁴⁰ Garofalo “drank heavily,” consuming excessive quantities of both beer and hard liquor.¹⁴¹ There had been a fraternity ceremony that created a traditional mentoring relationship between active fraternity members and fraternity pledges.¹⁴² Most active fraternity members took part in the ceremony, although the fraternity did not require participation.¹⁴³ The ceremony itself did not involve alcohol.¹⁴⁴ Nonetheless, it was common for post-ceremonial festivities to take place.¹⁴⁵ These festivities typically included a post-ceremony drink with the mentor in the chapter house followed by a trip downtown for additional drinking activities.¹⁴⁶ Each mentor gave his respective pledge beer and hard liquor in this context.¹⁴⁷ On the ill-fated evening of the ceremony, Garofalo never made it out of the fraternity house—he became so intoxicated from liquor purchased by Chad Diehl, Garofalo’s mentor, that Garofalo tumbled down some stairs and staggered in a way that caused another fraternity member, Tim Reier, to describe his gait as “like an injured player from the field.”¹⁴⁸ Diehl and Reier placed Garofalo on a couch in a position such that he would not aspirate vomit in case he became sick.¹⁴⁹ Diehl stayed with Garofalo for a period of time while Reier left to hit the town with other fraternity members.¹⁵⁰ Diehl, who remained back at the fraternity house to look in on Garofalo, left for a while but returned and found Garofalo “snoring or, perhaps, ‘gurgling.’”¹⁵¹ At 3:00 a.m., Reier, who had gone downtown to drink with other fraternity members, returned to the house and saw Garofalo “snoring and look[ing] fine.”¹⁵² Reier turned over the drunken member again so as

601 N.W.2d 757 (Neb. 1999); *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998).

137. See *Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Barran*, 730 So. 2d 203.

138. See *Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Barran*, 730 So. 2d 203.

139. 616 N.W.2d 647.

140. *Id.* at 650.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 651.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

to avoid aspiration of vomit—and thought that Garofalo “looked pretty content.”¹⁵³ The next day, some time between 8:00 a.m. and 8:30 a.m., Reier looked in again and this time it appeared that Garofalo was sleeping.¹⁵⁴ According to the medical examiner, Garofalo actually had likely died sometime between 7:00 a.m. and 8:00 a.m.¹⁵⁵ Nonetheless, Garofalo’s death was not discovered that day until around 11:30 a.m., along with evidence of vomit near Garofalo’s body.¹⁵⁶ Following Garofalo’s death, a blood alcohol test caused the medical examiner to conclude that Garofalo’s blood alcohol content may have been as high as 0.30% some time before he died.¹⁵⁷

Garofalo’s family brought suit against several parties including the national fraternity, the local Iowa chapter, Reier, and Diehl.¹⁵⁸ Garofalo’s family appealed the trial court ruling granting summary judgment in favor of Reier, the local fraternity chapter, and the national fraternity to the Iowa Supreme Court.¹⁵⁹ The Iowa Supreme Court first considered any duty of the local chapter with respect to the death of the fraternity member.¹⁶⁰ The court considered whether there was a special relationship with the Iowa chapter and the fraternity pledge so as to impose a legal duty of care upon the local chapter to assist the student.¹⁶¹ Citing *Beach v. University of Utah*,¹⁶² the court concluded that there was no such special relationship as the critical issue in determining special relationship, in their terms, was relationship of “dependence or mutual dependence.”¹⁶³ The court was unwilling to characterize the relationship between members of a fraternity as a relationship of mutual dependence.¹⁶⁴

A critical issue with respect to the local chapter was violation of statutory law prohibiting underage drinking.¹⁶⁵ Following the earlier Iowa case of *Sage v. Johnson*,¹⁶⁶ the *Garofalo* court acknowledged that a “[v]iolation of [liquor laws] will support a common law cause of action by the underage person against the person furnishing the alcohol.”¹⁶⁷ Nonetheless, Iowa courts have construed a cause of action under Iowa liquor laws as fairly limited: to establish a cause of action under the statute, service must constitute “knowing and affirmative

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 649.

160. *Id.* at 652.

161. *Id.*

162. 726 P.2d 413 (Utah 1986).

163. *Garofalo*, 616 N.W.2d at 652 (citing RESTATEMENT (SECOND) OF TORTS, § 314A, cmt. b (1965)). It is important to realize that not all special relationships have this characteristic. Some relationships of dependence are not special for purposes of affirmative duty; some relationships that are legally special would be hard to categorize as based upon dependence.

164. *Garofalo*, 616 N.W.2d at 653–54.

165. *Id.* at 654.

166. 437 N.W.2d 582 (Iowa 1989).

167. *Garofalo*, 616 N.W.2d at 653.

delivery.”¹⁶⁸ As *Garofalo* pointed out, merely permitting consumption or knowing that alcohol is being consumed on premises is not sufficient to meet the statutory requirement of a “knowing and affirmative delivery.”¹⁶⁹

The Iowa Supreme Court in *Garofalo* determined that there was no knowing and affirmative delivery to the underage student by the fraternity.¹⁷⁰ Discussing a number of cases in which fraternities were held liable, the court distinguished those cases by determining that the critical factor in imposing responsibility is that alcohol was provided during an initiation process.¹⁷¹ The court concluded:

[T]he facts established in the record before us revealed no affirmative harm by the Iowa Chapter of Lambda Chi Alpha, illegal or otherwise, toward Garofalo. The drinking that ultimately led to Garofalo’s death was not part of any initiation ritual or ceremony. No chapter funds were used to purchase the liquor. It is true that tradition played a part in the decision by individual members to drink with underage pledges after the ceremony, and liquor was bought for that very purpose. But appellants have come forward with no proof to suggest, even impliedly, that Garofalo or any other member’s consumption was coerced or required as a condition of chapter membership. To the contrary, the record yields proof that Garofalo was an experienced, if not sensible, drinker and that at least one of his peers chose not to drink at all.¹⁷²

With this decision, the Iowa Supreme Court effectively equated “initiation” with only formal initiation ceremonies, and as a consequence, a chapter can escape responsibility for underage drinking so long as initiations neither require nor coerce—by ritual rules or pressure by chapter leaders in the scope of their official capacities—a member to consume liquor. De facto tradition was distinguished from formal ceremony or initiation: *Garofalo* attempts to create a bright line distinction for liability. The Iowa Supreme Court approved of the trial court’s decision to use summary judgment because there was insufficient evidence of duty for the case to go to a jury.¹⁷³

What is disturbing about *Garofalo* is that the court itself admitted that it was “traditional following the ceremony for each big brother to invite his new little brother to his room to toast their new relationship with drinks before adjourning to downtown taverns for more serious partying.”¹⁷⁴ Alcohol was purchased specifically for the toasting event following the chapter ceremony and was to precede the heavier drinking.¹⁷⁵ The decentralized purchase and consumption of alcohol was designed to avoid the problem of slush funds being created by social

168. *Id.* at 653 (citing *Fullmer v. Tague*, 500 N.W.2d 432 (Iowa 1993)).

169. *Id.* at 653.

170. *Id.* at 654.

171. *Id.* at 653 (internal citations omitted).

172. *Id.* at 653–54.

173. *Id.* at 654.

174. *Id.* at 650.

175. *Id.* at 653.

chairmen to purchase alcoholic beverages.¹⁷⁶ Such a slush fund likely would have led the *Garofalo* court to a finding of liability on the basis that it was officially sanctioned by a fraternity.¹⁷⁷ Again, the court admitted that “[t]he ceremony may have created an opportunity for members to be together which could have spawned an opportunity to drink alcohol, but the ceremony itself carried no imperative for consumption.”¹⁷⁸ The court concluded that “[i]ndications regarding Garofalo’s intake of alcohol reflect[ed] a decision on his part to consume rather than a mandate from his house mates to that effect.”¹⁷⁹ The Iowa Supreme Court ruled that only if a student were coerced, forced, or mandated to consume alcohol would a duty exist.¹⁸⁰ *Garofalo* effectively held that despite knowledge and complicity of the fraternity in the violation of underage alcohol rules, no legal liability can flow against a local chapter for injuries resulting from underage drinking unless the drinking occurs in the context of initiation or is coerced, forced, or otherwise involuntary. Such a rule encourages subterfuge tactics to avoid alcohol rules; and it also encourages the creation of an “unofficial culture” which is actually, in all reality, the true culture of the fraternity. The drinking that occurred was clearly in pursuance of a goal of the chapter—making a mockery of the fraternity’s official statements of fellowship and compliance with local and federal alcohol laws.¹⁸¹ *Garofalo* was not a good decision in this regard, and is not in any way consistent with the vision of a facilitator college or fraternity. The ruling encourages fraternities to engage in dangerous high-risk drinking.

There are, however, two sensible interpretations of *Garofalo*. First, the Court put significant emphasis upon the fact that Garofalo was an experienced drinker who chose to drink excessively and voluntarily.¹⁸² It is interesting to consider what the Iowa Supreme Court might have done with a less experienced drinker, or with someone who had become seriously intoxicated without the type of self-generated excessive behavior that the student displayed in the *Garofalo* case. Is *Garofalo* just a case about Bluto Blutarsky of Animal House fame?¹⁸³

The other way to make sense of the *Garofalo* case may lie in the distinction between a chapter and a house corporation.¹⁸⁴ In the Greek world, living arrangements are typically governed by several entities. For one, the local chapter makes many of the rules and regulations for chapter life and is significantly

176. *Id.*

177. *Id.*

178. *Id.* at 651.

179. *Id.*

180. *Id.* at 654.

181. *Id.* at 650.

182. *Id.* at 653–54.

183. NATIONAL LAMPOON’S ANIMAL HOUSE, (Universal 1978) [hereinafter ANIMAL HOUSE]. *Animal House* is a fictional film about the fictional Delta House, a hedonistic fraternity that rebels against an autocratic university administration. Bluto Blutarsky is a member of the Delta House, and is characterized throughout the film as a rowdy individual who parties and drinks to excess.

184. See *Garofalo*, 616 N.W.2d at 657 (Lavorato, Larson & Ternus, JJ., concurring in part and dissenting in part) (discussing defendant Lambda Chi Alpha’s house corporation status).

involved in initiation and ceremony.¹⁸⁵ The national chapter also sets guidelines, rules, and regulations.¹⁸⁶ In addition, a house corporation is often the entity that owns, and to some extent, operates the facility in which Greek students live.¹⁸⁷ There is such a close legal connection between a house corporation and a local chapter that it may be confusing and difficult to sort out which entity is the possessor for purpose of determining landowner duty liability. Many injuries to students in fraternity houses occur in common areas that are traditionally under the control of the landlord and thus are the responsibility of the landlord or house corporation.¹⁸⁸ As a result, one interesting issue that was not raised by the *Garofalo* case would be the obvious issue of special relationships arising through landlord-tenant and business-invitee relationships. No analysis of this issue appears anywhere in the opinion, and it would have been helpful for the court to have at least made a reference as to why this issue was not raised in the case. If *Garofalo* assumes, sub silentio, that a house corporation bears responsibility for common areas, then the case is less disturbing from a high-risk alcohol prevention perspective.

The *Garofalo* court also considered whether the national chapter bore any responsibility.¹⁸⁹ The court disallowed claims against the national chapter: “[T]he national fraternity had no more duty than the Iowa chapter to protect Garofalo from his decision to drink following the big brother/little brother ceremony. It neither furnished the alcohol he consumed nor forced him to consume as part of any recognized fraternal activity.”¹⁹⁰ The court analogized its decision to the national cases that it believed had refused “to hold universities responsible for injuries resulting from the drinking habits of their adult but underage children”¹⁹¹ The court cited *Bradshaw*, *Booker*, and *Beach* to this effect but ignored the contradictory cases of *Furek*, *Knoll*, and *Coghlan*.¹⁹² The Iowa Supreme Court failed to distinguish these cases, which were plainly apposite. Nonetheless, the decision is consistent with many decisions from other courts in result, if not in rationale.¹⁹³ Although national chapters have been subject to successful

185. See *id.* at 650 (majority) (implying that the local fraternity chapter created rules).

186. *Id.* at 654.

187. E.g., ALPHA XI DELTA, *Alpha Xi Delta Housing Corporation*, available at <http://www.alphaxidelta.org/housingmission.asp> (last visited May 8, 2005).

188. See *Sec’y of Housing & Urban Dev. v. Layfield*, 152 Cal. Rptr. 342, 343 (Cal. Super. App. Dept. 1978).

189. *Garofalo*, 616 N.W.2d at 654–55.

190. *Id.* at 654.

191. *Id.*

192. *Id.* (citing *Bradshaw v. Rawlings*, 612 F.2d 135, 141 (3d Cir. 1979); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237–38 (E.D. Pa. 1992); *Beach v. Univ. of Utah*, 726 P.2d 413, 419–20 (Utah 1986); but not *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991); *Knoll v. Bd. of Regents of Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999)). The first series of cases found no duty was owed to students who voluntarily drank to excess and became injured as a result, the second set of cases held that a duty was sometimes owed to students who voluntarily drank to excess.

193. E.g., *Bradshaw*, 612 F.2d at 141; *Booker*, 800 F. Supp. at 237–38; *Beach*, 726 P.2d at 419–420.

lawsuits,¹⁹⁴ most courts seem to be more concerned with local chapter and individual member responsibility.¹⁹⁵

The most challenging feature of the *Garofalo* court's analysis was with respect to Reier.¹⁹⁶ Diehl had furnished alcohol to the decedent; Reier had not.¹⁹⁷ The court rejected the argument that fraternity brothers enjoyed a special relationship with respect to each other that creates a duty to rescue.¹⁹⁸ The court considered whether section 324 of the *Restatement (Second) of Torts*, which deals with taking charge of one who is helpless, applied in this situation.¹⁹⁹ With respect to Reier, who did not furnish alcohol to Garofalo but took actions with respect to Garofalo's care, the court stated:

Thus the question boils down to whether Reier 'took charge' of Garofalo on the night in question. Appellants contend Reier assumed this duty when he permitted Garofalo to lie down on the couch in his room. He acted reasonably, they concede, when he left Garofalo in Diehl's care while he went downtown. Upon Reier's return to the fraternity house, however, they contend his duty resumed. They fault Reier for "going to bed" and failing to "constantly monitor or check on Garofalo throughout the remainder of the early morning hours of September 8." They cite the fact that Reier made no attempt to awaken Garofalo before he left for class as evidence that he breached his duty to him.

We, like the district court, do not believe these facts, viewed in their most favorable light, establish a special duty running from Reier to Garofalo based on section 324 of the Restatement. Reier was not responsible for Garofalo's intoxication. He was not his "big brother." He merely let Garofalo "sleep it off" on his couch. Even if these facts could be stretched to fit the notion of "taking charge," Reier's conduct reveals no breach of that duty. When he left the fraternity house at midnight, Garofalo was intoxicated but conscious. When Reier returned to his room at 3:00 a.m., Garofalo was asleep and snoring. Reier repositioned him on his side, mindful for his safety. When he hurried out the door for an 8:30 a.m. class, Reier glanced at Garofalo, assumed he was asleep and made no attempt to awaken or "revive" him. Although appellants fault this later omission, we believe the standard urged by appellants is substantially higher than what is required under the Restatement. Given the gratuitous nature of the undertaking, the

194. Mumford, *supra* note 8, at pt. IV.

195. See, e.g., *Garofalo*, 616 N.W.2d at 652 (precluding summary judgment for an individual fraternity member defendant); *Coghlan*, 987 P.2d at 314 (precluding summary judgment for sorority defendant).

196. *Garofalo*, 616 N.W.2d at 655-56.

197. *Id.* at 650.

198. *Id.* at 655. This position is sound. Only one case clearly creates a special relationship for "companions on a social venture." *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976).

199. *Garofalo*, 616 N.W.2d at 655.

rule requires only acting in “good faith and with common decency” and relieves the actor from responsibility for “a high standard of diligence and competence, to possess any special skill, or to subordinate his own interest to those of the other.” Thus Reier and the chapter were entitled to judgment as a matter of law in this claim.²⁰⁰

The court hedged on the issue of legal duty in regard to Reier. The court indicated that even if Reier’s conduct would fit under the notion of assuming a duty by taking charge, Reier’s conduct revealed no *breach* of that duty.²⁰¹ On this point the court may have been correct, although such issues are often for a jury. Most of Reier’s conduct, although not consistent with professional or emergency medical technician’s standards, was in the nature of giving reasonable assistance. Some judges might be willing to send to the jury the issue of whether Reier should have taken more steps in the early morning hours for the assistance of the other intoxicated fraternity member.

While the one fraternity member may have barely escaped liability, Diehl, who provided the alcohol, did not fare as well.²⁰² The Iowa Supreme Court stated that “based on evidence that Diehl furnished alcohol to Garofalo in violation of state law, and disputed facts regarding his conduct once Garofalo became intoxicated and passed out, the [lower] court ruled summary judgment in Diehl’s favor would be inappropriate,” and Diehl did not appeal the lower court’s denial of his summary judgment motion.²⁰³ While there were disputed facts regarding Diehl’s conduct, as reported in the *Garofalo* decision, his conduct was not significantly different from the conduct of Reier except for the fact that he directly furnished alcohol to Garofalo.²⁰⁴ Thus, it is crucial to realize that even in a non-sanctioned, non-coercive, fraternity-related event, a member of a fraternity who acts as an alcohol-supplier may be held responsible for injuries that flow to a student as a result of alcohol consumption—even if the injured student uses excessive amounts of alcohol voluntarily.

One other feature of *Garofalo* stands out. The court split with respect to some of the defendants and sat en banc to hear the case.²⁰⁵ With respect to the ruling of the lower court regarding the national fraternity, all of the Iowa Supreme Court justices agreed that the national fraternity should not be held liable.²⁰⁶ As to the ruling of the lower court with respect to Reier, four justices agreed that summary judgment in his favor was proper; two disagreed.²⁰⁷ Most importantly, however, the justices split three to three on the issue of whether the local chapter should be held responsible for the events related the big brother ceremony.²⁰⁸ In a vigorous

200. *Id.* at 655–56.

201. *Id.*

202. *Id.* at 654–55.

203. *Id.* at 652.

204. *Id.* at 650–51.

205. *Id.* at 656. However, two justices took no part in the case. Six justices heard the case.

206. *Id.*

207. *Id.*

208. *Id.* at 656–60 (Lavorato, Larson & Ternus, JJ., concurring in part and dissenting in part).

partial dissent, Justice Lavorato and two other justices challenged the reasoning of the affirming split with respect to the local chapter.²⁰⁹ According to the dissent on this issue:

The evidence in this case is that underage drinking in the Iowa chapter house was the norm rather than the exception long before the incident in question. As the majority itself notes, virtually every witness testified that beer and other alcoholic beverages were made available to underage members. The reasonable inference from the record is that virtually every member was aware that this was happening and virtually every member, passively if not actively, approved of the practice.

A report of the university investigation of the incident revealed that many of the twenty-four new members who participated in the “Big Brother/Little Brother” ceremony consumed alcohol purchased by other chapter members in the chapter house after the ceremony. The report clearly revealed that all twenty-four new members were under the legal drinking age, as were many of the active members. Besides the forty-eight little brothers and big brothers, at least twelve other chapter members came to the ceremony, bringing the total number of members in attendance to sixty. Additionally, the report noted that three new chapter members passed out as a result of the alcohol consumption, including the decedent. The report also noted that the decedent consumed all the liquor provided him by chapter members within one hour after the conclusion of the ceremony. According to the investigation report, active members, including some chapter officers (defendant Chad Diehl was vice-president of the chapter), purchased alcohol before the ceremony with the intention of offering it to new members after the ceremony had concluded. Following the ceremony, alcohol was available in three rooms on the second floor of the chapter house and in three rooms on the third floor of the house. In all six rooms, hard liquor was available as well as beer, in several rooms more than one variety of hard liquor was consumed. There was some evidence that other rooms in addition to the six offered an open bar. The decedent’s drinking spree occurred in three of the rooms.

All of this drinking was traditional following the “Big Brother/ Little Brother” ceremony, and that included drinking by underage members and associate members.

The university concluded that the post-ceremony activities took place in the course of the Iowa chapter’s affairs. The university suspended the chapter, finding that it did not exercise reasonable preventative measures to ensure compliance with relative policies (one of which was to comply with Iowa’s underage drinking statute) in the course of the chapter’s affairs.²¹⁰

209. *Id.*

210. *Id.* at 658–59 (emphasis added).

In light of this significant evidence suggesting a strong connection between the local chapter's activities and the incident, the dissenters concluded that there was a genuine issue of material fact to determine whether the local chapter owed the decedent a duty.²¹¹

In many ways the legacy of the *Garofalo* case is the virtual certainty of further litigation on the same issue in other cases. Even with respect to Reier, who did not furnish alcohol, the significant disagreement among the justices the Iowa Supreme Court leaves open the possibility that slight variations in the facts of the next case could be distinguishable.²¹² Most importantly, the summary judgment granted by the lower court in favor of the local chapter²¹³ was affirmed only by the operation of the rule of law due to the three-three split on the issue of its liability.²¹⁴ The case is solid precedent for the proposition that no duty is owed by national organizations,²¹⁵ but of little decisive long-term value as a precedent in future cases regarding local chapter responsibility.²¹⁶

From the point of view of *Rights and Responsibilities*, the *Garofalo* case is one of the most interesting that has occurred in the past five years. The *Garofalo* case illustrates that some courts will undoubtedly continue to rely upon the bystander-era precedent of *Beach*, *Bradshaw*, and *Rabel*²¹⁷ despite current trends in the law.²¹⁸ The three-three split on the issue of chapter responsibility precisely illustrates the difference between the bystander and facilitator concepts. The three justices voting to affirm the summary judgment of the lower court did not believe that the chapter should be anything more than a bystander to collateral activities occurring in student rooms after formal chapter process and ritual.²¹⁹ This ruling would clearly suggest that the most dangerous legal course of action for the chapter would be to engage in proactive measures to deal with high-risk alcohol activities occurring in the chapter house following formal or ceremonial proceedings. The great risk would be to assume a duty.

The three justices who disagreed with granting summary judgment in favor of the local chapter showed that they were inspired by concepts of facilitation. A facilitator organization, like its host university, deals not just with what it causes, directly coerces, or brings into action or form, but also with what it facilitates, engenders, and indirectly promotes.²²⁰ A facilitator university or Greek

211. *Id.* at 659.

212. *Id.* at 656 (majority) (outlining the breakdown of judicial opinions in *Garofalo*).

213. *Id.*

214. 5 AM. JUR. 2D *Appellate Review* § 908 (2004).

215. *Garofalo*, 616 N.W.2d at 656 (all justices agreed that summary judgment was appropriate for the fraternity's national organization).

216. *Id.* at 656 (Lavorato, Larson & Ternus, JJ., concurring in part, and dissenting in part) (showing a 3-3 split on the issue of local chapter liability).

217. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 78 (citing *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987)).

218. *Id.* at 128.

219. See *Garofalo*, 616 N.W.2d at 653-54 (finding no duty of local chapter to intervene).

220. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193-201.

organization looks to the substance of a situation, not just to form. The initiation/relationship ceremonies are sometimes the context for very dangerous high-risk drinking activities. A fraternal value of fellowship means little if it does not bring with it a commitment to take reasonable steps to protect people from clearly foreseeable high-risk danger.

Garofalo lends support to *Rights and Responsibilities*' assertion that the law still sits on a cusp between two different generations of thought. On the one side, and largely in the past, lies an image of the college student as adult to whom host institutions and organizations serve as little more than structures for formal educational or ceremonial activities. On the other hand, and in the future, lies a vision of the college or university in which whole life learning and living integrates educational and extra-curricular activities. The process of moving from one generational vision to another is something that will take more than a few years, and it is likely that *Garofalo*-like decisions will continue to surface over the next few decades or so. There is, however, a strong wind at the back of the facilitator model, even though the voyage is not over.

A case from 2004 stands out as an important case in relation to the alcohol-related themes of *Rights and Responsibilities*, although it is not directly a case relating to student safety as such. In *Pitt News v. Pappert*,²²¹ the United States Court of Appeals for the Third Circuit struck down a Pennsylvania law that barred alcohol beverage advertising in college and university newspapers.²²² In holding that the First Amendment does not permit such a restriction, the court remanded the case to the district court for the entry of a permanent injunction in favor of permitting alcohol advertising.²²³ In the mid-1990s the Pennsylvania legislature amended the state liquor code to prohibit "any advertising of alcoholic beverages" in any communication format at a college or university.²²⁴ The act defined specifically what constitutes "unlawful advertising."²²⁵ Pursuant to the act, the Pennsylvania Liquor Control Board ("PLCB") promulgated an advisory notice dealing with the new law.²²⁶ The *Pitt News*, a publication created by the University of Pittsburgh Board of Trustees, displayed alcoholic beverage ads.²²⁷ The PLCB became aware of these advertisements and communicated with licensees regarding the statute and regulatory advisory.²²⁸ At least one major licensee cancelled a significant advertising agreement with the paper.²²⁹

The statute and regulation were, in part, an attempt to use Pennsylvania law to promote the environmental management strategy as outlined by the Higher

221. 379 F.3d 96 (3d Cir. 2004).

222. *Id.* at 113.

223. *Id.*

224. 47 PA. CONSOL. STAT. ANN. § 4-498 (West 2004) (struck down in *Pappert*, 379 F.3d 109-10).

225. 47 PA. CONSOL. STAT. ANN. § 4-498 (West 2004).

226. *Pappert*, 379, F.3d at 102.

227. *Id.*

228. *Id.* at 103.

229. *Id.*

Education Center of the U.S. Department of Education.²³⁰ Studies have shown that raising taxes on alcoholic beverages, limitations on alcohol advertising, and regulation of alcohol outlet operation all contribute to reductions in alcohol use.²³¹ Moreover, the reduction of alcohol advertising also tends to reduce the impression in college students that college is about consumption of alcohol and, particularly in the context of college sports, an excuse to become highly intoxicated.²³²

The Third Circuit deployed the four-part test determining the constitutionality of commercial speech as set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²³³ The regulation failed the four-part test according to the court because the regulation was found not to have furthered a substantial government interest.²³⁴ This decision will have a chilling effect on regulations that would be used to limit certain forms of alcohol advertising and commercial speech in college publications.²³⁵ The implications of this decision are not entirely consistent with facilitator norms. A facilitator university attempts to create an overall environment in which reasonable and responsible choices are most likely to be made.²³⁶ It will be more difficult to promote a safe and reasonable campus environment when that environment features publications which generally promote alcohol use and in some cases excessive alcohol use.²³⁷ Free speech is a core value for a facilitator college, but that value must be balanced with other values.²³⁸ While this decision will not operate as a categorical bar to all regulatory activity with respect to college and university newspapers, it does impose burdens on the regulatory bodies that may be insurmountable in some cases.

There is some indication that the shift away from *Beach*, *Bradshaw*, and *Rabel* is trickling down to lower courts from the technically unreported decision of a Connecticut court in *McClure v. Fairfield University*.²³⁹ In *McClure*, a Connecticut superior court considered a situation involving a vehicular accident

230. William DeJong et al., *Environmental Management*, available at <http://www.edc.org/hec/pubs/enviro-mgmt.html> (1998); See also Lake & Epstein, *supra* note 40, at 627 (discussing how controlling the influence of alcohol on the campus environment can reduce alcohol-related risks).

231. DeJong et al., *supra* note 230.

232. *Id.*

233. 447 U.S. 557 (1980). See *Pappert*, 379 F.3d at 106. The four-part test that determines whether a commercial speech restriction is constitutional is as follows: (1) the speech in question must be protected under the First Amendment; (2) the government must have a substantial interest in regulating that speech; (3) the restriction must further the substantial interest enumerated by the government; and (4) the regulation must not be overly-broad in serving the enumerated government interest. *Id.* (applying the “four-part analysis” set forth in *Central Hudson*, 447 U.S. at 566).

234. *Pappert*, 370 F.3d at 107.

235. *Id.* at 106–10.

236. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193.

237. DeJong et al., *supra* note 230.

238. See BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193 (stating that part of the facilitator’s responsibility is to withdraw options where appropriate).

239. *McClure v. Fairfield Univ.*, 2003 WL CV000159028, No. 21524786 (Conn. Super. Ct. June 19, 2003).

stemming from an off-campus outing at a beach involving alcohol use, for which the university offered a safe ride program.²⁴⁰ The complaint alleged various forms of negligence against the university including failing to adequately supervise and monitor off-campus and underage drinking.²⁴¹ In considering whether a duty was owed from the university to the injured students, the court specifically considered the trilogy of *Beach*, *Bradshaw*, and *Rabel*.²⁴² The court, however, spoke more highly of *Furek v. University of Delaware*,²⁴³ in rejecting the reasoning of that line of cases.²⁴⁴ While the court's reasoning seemed to turn upon an assumption of duty argument—based upon the fact that the university had provided a safe ride program between the beach and campus²⁴⁵—its comments about *Beach* and *Bradshaw* and the change in the minimum drinking age and alcohol issues are instructive:

Both *Furek* and *Mullins* are distinguishable from the present case in that the events in those cases occurred on campus. However, while the events in the present case occurred off-campus, the university's providing information about the beach area housing in the student binder was an imprimatur. It was well known that students would attend parties at the beach residences where they would consume alcohol. When *Bradshaw* and *Beach* were decided, the legal drinking age in a majority of jurisdictions was 18 years of age. In Connecticut, the legal drinking age is presently 21 years of age, as it was at the time of the accident. A large percentage of university students are therefore below the age of majority with respect to the usage of alcohol. Student alcohol use has become an increasingly serious problem in recent years. The university has acknowledged this in that it has an anti-alcohol policy that applies to all underage students. While the university had knowledge that underage drinking frequently occurred at the beach area, it did nothing to enforce the policy there, which indirectly encouraged students to go to the beach area in order to drink alcohol.²⁴⁶

Not only did the court reject the *Beach* and *Bradshaw* rationales, it went on to predicate a duty upon the existence of and awareness about alcohol rules and policies, as evidenced by the school's safe-ride program.²⁴⁷ The interesting question in light of the *McClure* case—in addition to whether it will ultimately remain the law of Connecticut—is whether the case would have turned out differently if there had been no safe-ride programs in place.

Technically, the case is unreported; however, it has been cited in another

240. *Id.* at *1.

241. *Id.* at *1 n.1.

242. *Id.* at *3–4.

243. 594 A.2d 506 (Del. 1991)

244. *McClure*, 2003 WL at *5.

245. *Id.* A safe-ride program enlists volunteers to safely drive individuals to and from locations serving alcohol. *Id.* at *4.

246. *Id.* at *7.

247. *Id.* at *4, *7–8.

jurisdiction.²⁴⁸ The *McClure* matter went to arbitration, and in a subsequent decision, the same Connecticut court decided that the arbitration award barred further recovery by the plaintiff against the university defendant in the matter.²⁴⁹ Nonetheless, since reported cases involving college and university liability from alcohol injuries are so few and far between, it is inevitable that the case will be cited again.

B. Sexual Assault, Suicide, and Causation Cases

1. Sexual Assault

The problems of sexual assault at colleges and universities—usually fueled by alcohol—have continued to vex courts since publication of *Rights and Responsibilities*.²⁵⁰ Two important decisions have occurred since 1999 that are potentially reconcilable with *Rights and Responsibilities*, although perhaps with some difficulty.²⁵¹ Both cases involved female students being sexually assaulted in residence halls.²⁵²

In *Freeman v. Busch*²⁵³ and *Stanton v. University of Maine System*,²⁵⁴ the Eighth Circuit Court of Appeals and the Maine Supreme Judicial Court, respectively, confronted this issue of college sexual assault. The *Freeman* court declined to impose a duty on the university to protect a student from a sexual assault.²⁵⁵ In *Stanton*, however, the Supreme Judicial Court of Maine took a different position and held that there was a duty to protect a female in a residential facility.²⁵⁶

In *Freeman*, the injuries to Carolyn Freeman arose out of a college party.²⁵⁷ Freeman was invited to party at the dorm room of her attacker, Scott Busch.²⁵⁸ Freeman became drunk and blacked out.²⁵⁹ While Freeman was unconscious, Busch sexually assaulted her.²⁶⁰ Freeman sued Simpson College under the theory that the college should be responsible under the doctrine of respondeat superior for the negligent failure of the resident assistant to prevent the assault.²⁶¹ The trial court granted Simpson College's motion for summary judgment, ruling that the

248. *Freeman v. Busch*, 349 F.3d 582, 588 n.6 (8th Cir. 2003).

249. *McClure v. Fairfield University*, 2004 WL 203001, No. CV000159028S, at *1 (Conn. Super. Ct. Jan. 14, 2004).

250. *Freeman*, 349 F.3d 582; *Stanton v. Univ. Me. Sys.*, 773 A.2d 1045 (Me. 2001).

251. *Freeman*, 349 F.3d 582; *Stanton*, 773 A.2d 1045.

252. *Freeman*, 349 F.3d at 585; *Stanton*, 773 A.2d at 1047–48.

253. 349 F.3d 582 (8th Cir. 2003).

254. 773 A.2d 1045 (Me. 2001).

255. 349 F.3d at 589.

256. 773 A.2d at 1052.

257. 349 F.3d at 585.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 586–87.

college owed no duty to Freeman, and Freeman appealed to the Eight Circuit Court of Appeals.²⁶² On appeal, the Eighth Circuit correctly noted that there is no special relationship between the college and the students simply because students are students of the college.²⁶³ The court, however, noted that there are circumstances under which courts have found that a duty is owed and a special relationship exists.²⁶⁴

In *Freeman*, the evidence linking the resident assistant to the incident was relatively thin. Some time after Freeman had passed out from alcohol intoxication, Busch went downstairs and informed the resident assistant that he had a visitor (Freeman) who had consumed alcohol, thrown up, and passed out.²⁶⁵ The resident assistant informed Busch to monitor Freeman's condition and to report back if things took a turn for the worse.²⁶⁶ Freeman and Busch then had sex.²⁶⁷ The parties disagreed as to whether the sex was consensual.²⁶⁸ Freeman alleged sexual assault and asserted that no consent had been, nor could have been, given in her unconscious state, while Busch alleged that the sex had been consensual.²⁶⁹ After the disputed sexual encounter, two other students returned from a fraternity party and both of them were permitted by Busch to engage in impermissible touching of Freeman.²⁷⁰ Based on these facts, the court declined to hold that there was a special relationship between the resident assistant and the plaintiff-student.²⁷¹

While it is true that there was no special relationship between the resident assistant and Freeman (a student) arising simply out of the college-student relationship,²⁷² it is unclear why the court did not consider the more obvious basis for a special relationship: landlord-tenant.²⁷³ The court reasoned that since there was no special relationship between Freeman and the resident assistant the general rule of section 314A of the *Restatement (Second) of Torts* applies: generally, the mere fact that a party is aware of danger to others does not create a duty to assist.²⁷⁴ Yet, while the resident assistant was not the landlord, the resident assistant was an agent of the landlord—the institution.²⁷⁵ The landlord-tenant

262. *Id.* at 585.

263. *Id.* at 587–88 (citing inter alia *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000) and *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979)).

264. *Id.* at 588 n.6.

265. *Id.* at 585.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 589.

272. *See, e.g., Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 655–56 (Iowa 2000) (holding that fraternity membership does not create a special relationship); *Bradshaw v. Rawlings*, 612 F.2d 135, 141–43 (3d Cir. 1979) (holding that a college regulation prohibiting the possession or consumption of alcohol at college-sponsored events did not create a special relationship between the college and its students).

273. *RESTATEMENT (SECOND) OF TORTS* § 314A (1965).

274. *See id.*

275. *Freeman*, 349 F.3d at 586–87.

relationship creates a special relationship,²⁷⁶ and this should have been sufficient to create a relationship in this case.

The *Freeman* court also considered whether the resident assistant had assumed a legal duty to come to the victim's aid under section 324 of the *Restatement (Second) of Torts*.²⁷⁷ The court held that "a finding that [the residential assistant] 'took charge of' Freeman requires that he took specific action to exercise control or custody over her."²⁷⁸ The court then looked to *Garofalo* for assistance in determining whether the resident assistant had taken charge and control of the student.²⁷⁹ The court found *Garofalo* highly analogous and determined that "there is much less evidence that Huggins took control of Freeman."²⁸⁰ As the court went on to state, the resident assistant was informed that "[Freeman] had consumed a substantial quantity of alcohol; and that after consuming it, she had thrown up and passed out."²⁸¹ The court was not willing to interpret the resident assistant's decision to ask another to assist as a form of taking charge or control of Freeman.²⁸² The *Freeman* court did not feel that there was enough evidence to find that the resident assistant had "exercise[d] control or custody over Freeman."²⁸³

It may be that *Freeman* is nothing more than a no *breach* of duty case lurking as a "No-duty" case. The result in *Freeman* is sound; notifying a resident assistant that someone is drunk does not alert the resident assistant that a rape is likely. On these facts, many juries would likely agree that the resident assistant's conduct was not unreasonable. Indeed, this situation is tragically typical. Students who are drunk but do not need medical transport are often remanded to the care of friends, fellow students, and resident assistants. There are few drunk tanks on college campuses: the "solution" to the problem of what to do with thousands of significantly intoxicated students who are easy targets of abuse and a danger to themselves and others. If the alcohol crisis on campus is the Vietnam of this generation, its first lieutenants are the overworked and often under-trained and under-equipped resident assistants. *Freeman* may have recognized that coping with the triage of Friday and Saturday nights will lower the amount of care owed. It would have been better for *Freeman* to say that it ought to be cited with *Beach*, *Bradshaw*, and *Rabel*.²⁸⁴ The core implication of those cases is that colleges are

276. See RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965) (imposing a duty upon one who voluntarily takes custody of another such that it deprives the individual in custody of the opportunity to defend himself). It is unclear from the reported decision whether the landlord/tenant issue was ever raised or resolved in any proceeding. See *Freeman*, 349 F.3d 582. The failure of the court to address this issue, or the parties to raise it, is an oversight and undermines the credibility of *Freeman* as precedent for similar cases.

277. *Freeman*, 349 F.3d at 588.

278. *Id.* at 588 (citing RESTATEMENT (SECOND) OF TORTS § 324 (1965)).

279. *Id.* at 588 (citing *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654–55 (Iowa 2000)).

280. *Id.* at 588–89.

281. *Id.* at 589.

282. *Id.*

283. *Id.* at 588–89.

284. See *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Beach v. Univ. of Utah*, 726

overwhelmed by a hard-to-manage and persistent alcohol culture; the solution is not to say that there is no responsibility for danger, but rather to acknowledge that a reasonable college or university will do what it reasonably can with the resources it has. Such a standard would mean, at times, doing little or nothing.²⁸⁵

The Supreme Judicial Court of Maine has a different view.²⁸⁶ In *Stanton v. University of Maine System*, plaintiff Dolores Stanton was a “special student” taking classes at the university prior to receiving a high school diploma.²⁸⁷ While attending a pre-season soccer program and staying in dorms on the campus, she was sexually assaulted.²⁸⁸ Her attack arose out of a fraternity party.²⁸⁹ After being walked back to her dorm by a young man she met at the party, Stanton exited an elevator and went to her room.²⁹⁰ She opened her door and went inside.²⁹¹ When Stanton turned around, the young man was standing in her room; he proceeded to sexually assault her.²⁹²

Although there had been few rapes reported at that institution, Maine’s university system had engaged in significant safety planning for students regarding dorm room security.²⁹³ Importantly, however, Stanton had not received instruction on the rules and regulations regarding safety in the dormitory facilities and there were no signs indicating who should be permitted in and out of the dorms.²⁹⁴ The university provided a different level of safety training to full-time students.²⁹⁵ Despite this disparity in treatment between full-time students and Stanton, the trial court granted the university’s motion for summary judgment, holding that it did not breach any duty owed to her.²⁹⁶ On appeal, the Supreme Judicial Court of Maine pointed out that the university, as a premise owner, owed a duty to students as business invitees.²⁹⁷ There was “a duty to exercise reasonable care in taking such measures as were reasonably necessary for [Stanton’s] safety in light of all then existing circumstances.”²⁹⁸ The court recognized that under previous

P.2d 413 (Utah 1986); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987). *See also* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at ch. 4 (referring to the “bystander” era of college duty where colleges and universities have no obligation to interfere with students’ non-academic lives).

285. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 201–05 (limiting duty by a standard of reasonable care).

286. *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045, 1050 (Me. 2001).

287. *Id.* at 1047–48.

288. *Id.*

289. *Id.* at 1048.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *See id.* The court enumerated several different university safety precautions, such as meetings and signs, implying that these safety precautions were taken with full time students and not with a “special student” like Stanton, the plaintiff.

296. *Id.* at 1047.

297. *Id.* at 1049 (citing *Schultz v. Gould Acad.*, 322 A.2d 368, 370 (Me. 1975)).

298. *Id.*

decisions a landowner is under no duty to anticipate utterly unforeseeable burglars and rapists who might attack at any time without warning.²⁹⁹ Following *Mullins v. Pine Manor College*,³⁰⁰ the court stated that sexual assault was foreseeable at the university since the university environment is favorable for crime because of the high concentration of young people, and that the university took notice of this fact by implementing some preventative procedures.³⁰¹ On this basis, the Supreme Judicial Court had little trouble determining that the university owed a duty to Stanton and that the type of injury that occurred, sexual assault, was foreseeable.³⁰² In rejecting the university's motion for summary judgment, it noted that Stanton's statement "that the University failed to warn her of any dangers or explain the security measures implemented," was enough to generate a sufficient fact issue to go to a fact-finder.³⁰³

Stanton also attempted an interesting implied contract theory, which the court ultimately rejected.³⁰⁴ She sought to create something similar to an implied warranty of habitability, such as an "implied warranty of safety."³⁰⁵ In short order, the court refused to recognize the implied term because Stanton "fail[ed] to show with sufficient definiteness any terms that plaintiff allege were assented to by the parties."³⁰⁶ The *Stanton* court upheld the lower court's summary judgment in favor of the institution on this novel issue.³⁰⁷

Stanton reached a result that is consistent with a number of cases noted in *Rights and Responsibilities* that impose safety responsibilities on institutions with respect to dormitory students.³⁰⁸ *Stanton* is unique in that it relates to special students who come to campus for particular programs.³⁰⁹ Effectively, the *Stanton* court told the colleges and universities in Maine that students coming to campus for alternative programs are entitled to the same level of safety training that full-time residential students receive if those students will be exposed to the same types

299. *Id.* at 1049 (citing *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647 (Me. 1972)).

300. 449 N.E.2d 331 (Mass. 1983). It is important to remember that the Maine Supreme Judicial Court is a court whose jurisdiction is intimately connected to the Massachusetts Supreme Judicial Court, which decided *Mullins v. Pine Manor College*. At one time, the Supreme Judicial Court of Massachusetts actually had jurisdiction over much of what is now Maine. See MAINE STATE ARCHIVES, *Summary History of Courts in Maine*, available at <http://www.state.me.us/sos/arc/archives/judicial/courthis.htm> (last visited May 8, 2005). It is common today for the two courts to consider each other as sister courts and precedent from one court is often closely followed in the other.

301. *Stanton*, 773 A.2d at 1050.

302. *Id.*

303. *Id.*

304. *Id.* at 1050–51.

305. *Id.*

306. *Id.* at 1051.

307. *Id.*

308. See BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 112–15, 137–44 (discussing *Delaney v. Univ. of Houston*, 835 S.W.2d 56 (Tex. 1992); *Johnson v. Washington*, 894 P.2d 1366 (Wash. Ct. App. 1995); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993)).

309. *Stanton*, 773 A.2d at 1047–48.

of risks as residential students.³¹⁰ Colleges and universities typically provide orientation and safety training to full-time traditional students,³¹¹ but may let certain groups of individuals who come to campus for special programs or overnight stays slip through the cracks.³¹² Dangers to atypical students may be equal to or even greater than risks to typical students, since the former are often new to the area and unfamiliar with specific risks and the best means to protect themselves.

2. Suicide

Perhaps the most difficult issue for the facilitator institution to address is the issue of self-inflicted injury and suicide. In our article, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, Dr. Nancy Tribbensee and I discuss the burgeoning problem of self-inflicted injury on campus.³¹³ *Rights and Responsibilities* was essentially silent on this issue. Two important court decisions have come down since *Rights and Responsibilities* dealing with the subject of self-inflicted injury. These cases, *Schieszler v. Ferrum College*³¹⁴ and *Jain v. Iowa*,³¹⁵ both address student suicide.

In *Schieszler*, a student named Michael Frentzel was suffering difficulties with school and social interactions.³¹⁶ Frentzel eventually wound up getting in an argument with his girlfriend, Crystal, in which Ferrum campus police and Frentzel's resident assistant intervened.³¹⁷ Frentzel proceeded to give Crystal a note stating his intent to hang himself with his belt.³¹⁸ The resident assistant and campus police responded again and found Frentzel locked in his room with self-inflicted bruises.³¹⁹ Within a few days, Frentzel wrote two more notes, one stating "tell Crystal I will always love her" and "only God can help me now."³²⁰ Crystal gave these notes to Ferrum employees, who forbid her from seeing Frentzel, but took no further action.³²¹ Ferrum employees found Frentzel in his room dead from a self-inflicted hanging shortly thereafter.³²² The district court refused to dismiss

310. *Id.* at 1047–51.

311. See, e.g., HOPE COLLEGE, *Hope College Orientation Student Schedule*, available at <http://www.hope.edu/orientation/student.php> (last visited May 8, 2005); ILL. WESLEYAN UNIV., *Welcome to Fall Festival: Orientation 2004 at Illinois Wesleyan University*, available at <http://titan.iwu.edu/~stdntaff/fallfestival/Intro/intro.html> (last visited May 8, 2005).

312. E.g., *Stanton*, 773 A.2d at 1047–48.

313. Lake & Tribbensee, *supra* note 135, at 125–29.

314. 236 F. Supp. 2d 602 (W.D. Va. 2002). This case is also referred to as the *Ferrum College* case.

315. 617 N.W.2d 293 (Iowa 2002).

316. *Schieszler*, 236 F. Supp. 2d at 605.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

the claim against Ferrum College arising out of the suicide.³²³ The case ended in settlement when Ferrum College chose to acknowledge a share of responsibility for the student's death.³²⁴

Jain also involved a student suicide, except that the Iowa Supreme Court handed down a no-liability ruling in favor of the university.³²⁵ In *Jain*, Sanjay Jain was a freshman student at the University of Iowa.³²⁶ Jain began contemplating suicide after suffering declining academic performance and punishment for repeated social misconduct.³²⁷ Jain then attempted to kill himself by asphyxiation—by running his moped in his locked dorm room—but was stopped by his girlfriend and a university resident assistant.³²⁸ The resident assistant advised Jain to seek counseling.³²⁹ The resident assistant also wished to contact Jain's parents, but Jain prohibited her from doing so.³³⁰ About a week later, Jain committed suicide by running his moped in his locked dorm room again.³³¹ Not surprisingly, the Iowa Supreme Court refused to find a special relationship between the student who committed suicide and the university.³³²

These cases are inconsistent. *Jain* held that no duty was owed by the institution, as a matter of law,³³³ while *Schieszler* held that a duty could exist.³³⁴ There is so little jurisprudence in this area that future cases will likely settle the direction that American law will take on this issue.³³⁵ On the horizon is the matter of *Shin v. MIT*, which is still being litigated in the Massachusetts court system.³³⁶ In the *Shin* case, a student at the Massachusetts Institute of Technology ("MIT") burned to death, allegedly at her own hand. A principal allegation in the case is that her death was a suicide and MIT did not inform the parents of their daughter's suicidal intentions.³³⁷ The case may turn, at least in part, on issues of causation: if the Shin family was aware that their daughter was suicidal, the Massachusetts courts may hold that, even if a duty to warn existed and was breached, MIT had no causal link to the ultimate injury because the family's lack of notice from MIT as to matters that the family already had knowledge of would not ordinarily be considered the but-for cause of harm.

323. *Id.* at 614–15.

324. *Va. College Acknowledges Some Responsibility in Student's Suicide in 2000 as Part of Lawsuit Settlement*, NORTH COUNTY TIMES, July 26, 2003, available at http://www.nctimes.com/articles/2003/07/26/backpage/7_26_036_13_44.txt.

325. *Jain v. Iowa*, 617 N.W.2d 293, 296, 300 (Iowa 2002).

326. *Id.* at 295.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 296.

331. *Id.*

332. *Id.* at 300.

333. *Id.*

334. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 614–15 (W.D. Va. 2002).

335. *See Lake & Tribbensee*, *supra* note 135, at 129–37.

336. *See Sontag*, *supra* note 135, at 57.

337. *Id.*

3. Causation

Causation is becoming a critical issue in higher education litigation as courts increasingly find that a duty is owed. Causation traditionally has not been a significant issue in higher education litigation; research in the cases prior to *Rights and Responsibilities* demonstrates that case law is thin in this area.³³⁸ This is not surprising. There is no reason to reach the question of causation if no duty exists in the first place, or if no breach of duty occurred. In an era of changing responsibilities for colleges and universities, however, causation is becoming a more prominent issue.

The most significant recent case on causation came from the California Supreme Court. *Saelzler v. Advanced 400 Group*³³⁹ involved an attack on a woman who was making a delivery at a low-income housing project.³⁴⁰ In a sharply divided, four-to-three decision, the *Saelzler* court determined that the plaintiff failed to show causation-in-fact, resulting in the dismissal of Saelzler's claim.³⁴¹

The case involved Marianne Saelzler, a delivery employee who attempted a delivery at a three hundred-unit multi-building apartment complex.³⁴² As Saelzler attempted to leave the premises, several men attacked her and attempted to sexually assault her.³⁴³ Saelzler staged a valiant defense and prevented the men from raping her, but she was seriously injured in defending herself.³⁴⁴ The complex was rife with crime and the police frequented the premises.³⁴⁵ Security patrols were deployed during the evening, but not during the daytime, presumably as a cost-saving measure.³⁴⁶ There was a security gate, but at the time of the attack it was propped open.³⁴⁷ The majority painted a very dark and terrifying picture of the apartment complex and its state of security and repair.³⁴⁸ Unsurprisingly, Saelzler was unable to identify her attacker.³⁴⁹ Crucially to her case, neither she nor anyone else was able to identify whether the assailants were living in the complex or had entered the premises either through the gate or by some other

338. See, e.g., *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Delaney v. Univ. of Houston*, 835 S.W.2d 56 (Tex. 1992).

339. 23 P.3d 1143 (Cal. 2001). Interestingly, the suit was not a college or university case at all; however, institutions in California filed an amicus brief in the case, arguing in favor of the defendant. *Id.* at 1145.

340. *Id.* at 1147.

341. *Id.* at 1155.

342. *Id.* at 1147.

343. *Id.*

344. *Id.*

345. *Id.* Additionally, the manager of the apartment complex only went to her vehicle with a police escort and pizza delivery would not be made into the complex—pizza delivery employees would only meet tenants at the street with their pizza. *Id.* The complex also allegedly housed gangs and a reported drug ring. *Id.*

346. *Id.*

347. *Id.*

348. See *id.* at 1147–48.

349. *Id.* at 1147.

means.³⁵⁰

Saelzler had a tortured path toward its four-to-three decision in the California Supreme Court.³⁵¹ The case originally had been dismissed on summary judgment, but the Intermediate Court of Appeals reversed and held for the plaintiff.³⁵² On appeal to the Supreme Court of California, the decision was rendered by a bare majority.³⁵³

The issues of duty and breach were not contested.³⁵⁴ In language reminiscent of cases on duty, rather than causation, the court engaged in policy analysis and acknowledged that the case presented a particularly difficult dilemma of attempting to determine whether to place financial burdens of increased security on low-income business defendants or to provide greater safety for victims in those complexes.³⁵⁵ The majority opinion reads as if the opinion had originally been written to state that no duty was owed, but in order to flip a judge to the majority, the opinion was edited to become a causation case.

The majority's reasoning was fairly straightforward. Since the gate was designed to deal with intruders, *Saelzler*'s failure to identify the assailants as either insiders or intruders was fatal to her claim because she would never be able to show by a preponderance of the evidence that it was the negligence of the complex that caused the assault.³⁵⁶ It is equally likely that the attack came from the inside and, if so, poor security and the broken gate would not have been the cause.³⁵⁷ Security patrols theoretically could have impacted crime within the complex. Nonetheless, the majority stated effectively as a matter of judicial notice that increased security cannot be shown to prevent the causation of crime, either *specifically* or in *general*.³⁵⁸ Thus, *Saelzler*'s failure to identify her assailants and whether they were from inside or outside the complex was fatal to her case because without that evidence she would be unable to establish causation between the defendant's breach of duty and her injury.³⁵⁹

Following *Saelzler*, many claims will fail where there is a defect in proof of causation. Although it is usually clear whether an assailant came, for example, from inside or outside a dormitory, there will be situations where it may be hard for an injured student to prove the identity of an assailant. *Saelzler* suggests that issues will shift from questions of duty and breach to questions of causation. Causation law in higher education portends significant development in the next

350. *Id.*

351. *Id.* at 1148.

352. *Id.*

353. *Id.* at 1155.

354. *Id.* at 1149. The issue, however, was whether the defendant's negligence *caused* the plaintiff's injuries.

355. *Id.* at 1152 (stating that even if security was more extensive in the defendant's complex, the attack still could have happened).

356. *Id.* at 1155.

357. *Id.*

358. *See id.* at 1152. The majority refused to acknowledge that lack of security personnel could be the cause of injury in a negligence case. *Id.*

359. *Id.* at 1155.

several decades.

II. FUTURE TRENDS

There are at least three trends in process that are related to the facilitator model. One of the developments most clearly connected to *Rights and Responsibilities* has been the rise of a risk management culture in student affairs. In the last decade, and especially in the last several years, colleges and universities have engaged in deliberate, proactive, risk management programs, some of which have been influenced by the facilitator model put forward in *Rights and Responsibilities*.³⁶⁰ A second major trend has been a movement to re-think student discipline and process norms.³⁶¹ It is becoming increasingly apparent that today's students exist in an environment where large amounts of academic cheating occur,³⁶² alcohol use is rampant and shows a stubborn refusal to decline,³⁶³ and sexual violence against college females is perhaps at an all-time high.³⁶⁴ The logical inference is that something is not functioning properly in our current student process systems. Third, as indicated earlier, we are on the leading edges of a significant self-inflicted injury/wellness crisis. The most significant and salient phenomenon of the current wellness crisis on campus is suicide; however, suicide is only the tip of an iceberg in a sea of wellness issues that includes depression, cutting, eating disorders, and social dysfunctions. A facilitator college or university is sensitive not only to academic and student safety, but also to the overall wellness of the community.³⁶⁵ Sound education requires not only safety, but conditions under which students are encouraged to promote individual and group wellness.

A. Risk Management

Recently, there have been many attempts to create risk management programs in higher education.³⁶⁶ Insurers of college student risk have engaged in programs of risk management information dissemination and training.³⁶⁷ Many institutions have undertaken their own independent risk management programs, including several that have been influenced specifically by facilitator concepts.³⁶⁸ Such

360. See *supra* note 9 and accompanying text.

361. Lake & Epstein, *supra* note 40, at 627–28.

362. PLAGIARISM.ORG, *Statistics*, at http://www.plagiarism.org/plagiarism_stats.html (surveying several different studies about the increasing prevalence of academic dishonesty) (last visited May 8, 2005).

363. See HIGHER EDUC. CTR., *supra* note 39.

364. U.S. DEPT. OF EDUC., *Forcible Sex Offenses* (showing statistics indicating an increase in forcible sexual assaults on-campus), available at <http://www.ed.gov/admins/lead/safety/crime/criminaloffenses/edlite-forcesex.html> (last visited May 8, 2005).

365. See BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 193 (stating that facilitator universities seek to guide and support students through difficult times in their lives).

366. See, e.g., Texas A&M Policy, *supra* note 9; Cal. State Bakersfield Policy, *supra* note 11.

367. See, e.g., FIPG Manual, *supra* note 11.

368. See, e.g., SYRACUSE UNIV., SYRACUSE UNIVERSITY RISK MANAGEMENT, available at <http://sumweb.syr.edu/ir/APM/BUSFIN/Risk.html#safpol> (last modified Nov. 2002) [hereinafter

institutions as Syracuse University have made notable proactive attempts to manage student behavior.³⁶⁹ Texas A&M University and DePauw University have been overt in their adoption of key precepts of the facilitator model.³⁷⁰ In addition, facilitator concepts are so closely aligned with environmental management strategies outlined by the U.S. Department of Education's Higher Education Center that risk management approaches taken on campus could easily be identified with either or both philosophical approaches.³⁷¹

Virtually all risk management programs feature some of the same basic principles. For example, risk management programs are based on principles of proactive intervention designed to reduce the possibility of future harm. This approach also has the incidental effect of potentially reducing litigation—however, litigation reduction is not a first goal of proactive intervention. Risk management programs are not litigation avoidance programs per se. Nonetheless, risk management programs are sensitive to the fact that litigation is often spawned when an injured party or his or her family feels aggrieved by an institution for a perceived mishandling of an incident. Conversely, institutions often avoid liability when an incident has been handled carefully and compassionately. Risk management must be based upon a genuine concern for student safety; only then does it seem to have the required effect.

Risk management is concerned with environmental factors. Few risk management programs are executed in isolation from comprehensive planning. Risk management today is based on principles of student empowerment. Integral to successful risk management is the use of students as agents of safety and the training of students to assist other students. Risk management principles acknowledge that some activities carry with them inherent dangers, along with ordinary background risks. Injury or even death may occur in a program at any time despite best efforts.³⁷² Risk management principles are not designed to eliminate all possible risks from every possible activity. Instead, consistent with legal principles, risk management typically focuses upon the reduction of risks that are not inherent or reasonable in an activity or sport while maintaining the principles of the activity or sport in question.

Risk management recognizes that some activities are simply too unreasonably dangerous to continue. Texas A&M's unusual saga involving its bonfire tradition illustrates that even after careful review certain activities are simply too dangerous to justify their continued existence.³⁷³ In this sense, risk management often

Syracuse Policy]; Texas A&M Policy, *supra* note 9; Cal. State Bakersfield Policy, *supra* note 11.

369. Syracuse Policy, *supra* note 368.

370. See Texas A&M Policy, *supra* note 9; Lake & McKiernan, *supra* note 9.

371. DeJong et al., *supra* note 230.

372. See BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 195 (stating that it is impossible to eliminate all risk from life).

373. Tosin Mfon, *A&M Remembers Bonfire Tragedy, University Pays Tribute to Victims, Mourns Loss of Honored Tradition*, DAILY TEXAN, Nov. 19, 2004, available at <http://www.dailytexanonline.com/news/2004/11/19/TopStories/Am.Remembers.Bonfire.Tragedy-811494.shtml>.

conflicts with local tradition.³⁷⁴ These local traditions and customs in colleges and universities often do not develop along safety boundaries.³⁷⁵ In fact, local traditions and customs often create unusual risks that seem odd or out of place at other colleges and universities.³⁷⁶ A risk management approach attempts to respect local traditions and customs to the extent that those traditions and customs are consistent with a reasonably safe environment. Many traditions and customs can easily be re-made to work within reasonable risk management guidelines.

In due course, a full body of scholarship and research regarding risk management will develop. This development may be one of the most important in the history of higher education safety. *Rights and Responsibilities* cannot claim to be the theoretical foundation for the current risk management culture. It is clear, however, that themes in *Rights and Responsibilities*, particularly with regard to the facilitator university concept,³⁷⁷ are consistent with and form the theoretical foundation for many risk management programs.³⁷⁸

B. Process

It is painfully apparent that *Rights and Responsibilities* was only a first book in a series of books related to similar and overlapping topics. Perhaps the most glaring omission in *Rights and Responsibilities*—diplomatically overlooked by our critics and supporters—is that it deals thinly at best with an issue central to creating a reasonably safe environment.³⁷⁹ Most risk management systems on some level ultimately depend on the functioning of process systems. Certainly, the viability of virtually every American college or university's academic integrity system depends on processes designed to deal with violations of academic standards. It is completely unthinkable that a facilitator institution could develop without parallel conceptualization regarding student process. At the time of the writing of this article, Professor Bickel and I are well into the process of producing a second book in the *Rights and Responsibilities* series dealing with student process rights, tentatively titled *New Process*.

Today, most student process systems, whether conduct or academic in nature, are typically highly legalistic and often feature extremely complicated procedural rules. There is some evidence that American higher education, however well-intentioned, may have gone a little off track in developing process rules and norms. Some courts themselves have indicated their concern about strategic thinking about the role and function of process on campuses. The most prominent case is *Schaer v. Brandeis University*.³⁸⁰ In that case, a sharply divided court narrowly upheld Brandeis University's discipline of a student arising out of inappropriate sexual

374. *Id.*

375. *Id.*

376. *Id.*

377. See *supra* note 5 (defining a facilitator university).

378. See *supra* note 9 and accompanying text.

379. See BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 193–201 (describing the role of a facilitator university in student life).

380. 735 N.E.2d 373 (Mass. 2000).

activity, affirming the lower court's summary judgment for the defendant predicated upon the fact that plaintiff David Schaer failed to state a claim on which relief could be granted.³⁸¹

In *Schaer*, a female student reported to the university that she woke up finding Schaer having sex with her even though she had previously told him "she 'did not want to have sex.'"³⁸² Under the auspices of the university, a university conduct board found Schaer to have violated provisions of the student university code.³⁸³ The determination resulted in Schaer's suspension from Brandeis.³⁸⁴ Schaer brought suit against Brandeis for failing to adhere to the disciplinary procedural rules that Schaer alleged Brandeis had previously established by contract.³⁸⁵ Among Schaer's claims were that the board failed to make an adequate record of the proceeding, permitted inappropriate evidence, did not appropriately apply the evidentiary standard, did not determine credibility properly, and failed to confer sufficient process, in contravention of Brandeis' contractual agreement with Schaer.³⁸⁶ The majority carefully considered each issue Schaer raised about the hearing procedure, but rejected his claim,³⁸⁷ with Judge Abrams speaking for the majority: "While a university should follow its own rules, Schaer's allegations, even if true, do not establish breaches of contract by Brandeis. Thus, Schaer has failed to state a claim"³⁸⁸

The *Schaer* dissenters believed that the dismissal of the complaint was premature.³⁸⁹ Justice Ireland stated:

In short, if the university puts forth rules of procedure to be followed in disciplinary hearings, the university should be legally obligated to follow those rules. To do otherwise would allow Brandeis to make promises to its students that are nothing more than a "meaningless mouthing of words. While the university's obligation to keep the members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on a serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself articulated. I would therefore

381. *Id.* at 375–76, 381.

382. *Id.* at 376.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* Brandeis required Schaer to sign a "Rights and Responsibilities" contract, the terms of which required certain standards of investigation of wrong doing, application of a specific evidentiary standard, limits on what disciplinary boards could consider during disciplinary hearings, and the creation of a record for purposes of appeal in the context of disciplinary hearings. *Id.* at 377 n.6, 377–81.

387. *Id.* at 377–81.

388. *Id.* at 381.

389. *Id.* at 381 (Ireland, J., dissenting, joined by Cowin, J.).

not affirm the dismissal of Schaer's complaint so hastily.³⁹⁰

The issue in the *Schaer* case emphasizes that an institution should be careful not to promise proceedings it will not or cannot deliver.³⁹¹ The majority opinion repeatedly referred to the fact that student hearings should not mimic judicial proceedings.³⁹² How much leeway will a court give a college or university that fails to meet its own stated procedures? Clearly if the *Schaer* case is an indication, some judges will feel that there is some room for interpretation and error;³⁹³ other judges will not be willing to grant significant latitude for error.³⁹⁴ The issue of how much room to grant colleges and universities in administering student process rights is a sharply polarizing issue. There is a continuing and identifiable subculture that effectively identifies changes in process rights away from anything other than full-blown judicial due process as a return to the era of double secret probation as portrayed in *Animal House*.³⁹⁵ For example, the *Schaer* case spawned a law review note that was sharply critical of the *Schaer* case and cases like it.³⁹⁶ The note, citing *The Shadow University*,³⁹⁷ argued that:

When private universities blatantly ignore due process standards at disciplinary hearings, everyone's due process rights are at stake. College disciplinary hearings are educational tools, and therefore, private colleges are teaching young Americans that the end result is far more important than the process. When college students enter American society as adults, their ideas about due process will be distorted. Our Constitution does not tolerate this inverted notion of justice; neither should private universities or the courts that interpret private university disciplinary decisions. If anything, American colleges and universities should teach students to respect and cherish the ideal that one is innocent until proven guilty under due process of law.³⁹⁸

Given the history of the abuse of process rights in American colleges and universities around mid-century,³⁹⁹ it is easy to see why process orientation is so strong in the hearts and minds of modern college and university students and

390. *Id.* at 382–83 (Ireland, J., dissenting, joined by Cowin, J.) (internal citations omitted).

391. *Id.* at 381 (majority opinion); *Id.* at 382–83 (Ireland, J., dissenting, joined by Cowin, J.).

392. *Id.* at 380–81.

393. *Id.* at 381.

394. *Id.* at 381 (Ireland, J., dissenting, joined by Cowin, J.).

395. *Animal House*, *supra* note 183. Part of the satire of university life presented by *Animal House* was that Dean Wormer, the university authority figure in the film, would arbitrarily and secretly place student organizations on probation with essentially no procedural process.

396. See Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169 (2001).

397. *Id.* at 169 (citing ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY* 279–80 (1998)).

398. Matloff, *supra* note 396, at 188.

399. See *Dixon v. Univ. of Ala.*, 294 F.2d 150, 151 nn.1–2, 152 n.3, 154 (5th Cir. 1961) (confronting the issue of whether a university could expel students in retaliation for the students' participation in a civil rights demonstration without a hearing or any student violation of school rules).

faculties. Nonetheless, as the above-cited article advocates, process ideals may be held too strongly in comparison to competing ideals. For example, holding students responsible for academic infractions or serious conduct violations under a beyond a reasonable doubt standard as suggested by the article,⁴⁰⁰ would leave our campuses teeming with dangerous individuals and rife with academic misconduct. Moreover, although there are tremendous interests at stake for students in college and university proceedings, students are not subject to jail sentences or serious fines and penalties as in criminal court. Even the civil tort justice system does not use this incredibly high standard of proof when dishing out civil justice awards. No case has ever held that due process of law requires that basic contract and tort cases be decided on a burden of beyond a reasonable doubt.

Underlying this quest for hyper-process protections for students is a deep mistrust of the inner workings of academic institutions. This problem may actually be exacerbated by the fact that, because discipline processes are typically confidential under FERPA,⁴⁰¹ student process often gives the appearance of proceedings like the Courts of Star Chamber.⁴⁰² The difference, of course, between a Star Chamber Court and a public college or university student discipline process is that federal law guarantees students' access to a level of process that the Star Chamber Court typically denied individuals subject to its draconian jurisdiction.⁴⁰³

Finding the right balance for process norms is essential to enabling a facilitator institution. Process issues portend significant philosophical, political, and technical battles. Finding a facilitator process will likely be more contested and contestable than other aspects of the facilitator model.

C. Wellness

Today wellness is a lesser concern to the modern college or university. Most risk management programs today focus principally on safety and risk reduction with a secondary emphasis, if an emphasis at all, upon harm to self. General norms of wellness do not usually occupy the same level of strategic vision and implementation that academics, athletics, and risk management currently do.

Nonetheless, a wellness crisis is on the horizon. It is already evident that more students are coming to campus with mental health and wellness issues than ever before. Collegiate wellness resources, such as health and counseling services, are

400. See Matloff, *supra* note 396, at 188 (suggesting that constitutional due process protections should extend to the university context).

401. 20 U.S.C. § 1232g(b), (d) (2000 & West Supp. 2004).

402. BRITAIN EXPRESS, *English History, The Court of Star Chamber 1487-1641*, available at <http://www.britainexpress.com/History/tudor/star-chamber.htm> (last visited May 8, 2005). The Court of Star Chamber was an English court that operated by mandate of the Crown to specially try—and consequently suppress—individuals who opposed the Crown's policies. *Id.* Star Chamber tribunals were held secretly with no right of appeal, exacting swift punishment upon any opposition to the Crown. *Id.*

403. Matloff, *supra* note 396, at 171–73; BRITAIN EXPRESS, *supra* note 402. Public college and university students are assured the right to a meaningful hearing under federal law, while Star Chamber defendants were typically denied any meaningful hearing.

already becoming overwhelmed, and there is no reason to believe that the trend will not continue. One significant issue that *Rights and Responsibilities* only glanced at is the interior workings of the facilitator model.⁴⁰⁴ In other words, the facilitator model was principally designed to deal with outward manifestations of inward states. Although the facilitator model was meant to be a philosophical conception that could be intuitively internalized, it was not a model for wellness. The facilitator model must develop a perspective on wellness and thus deal with both interior and exterior states. As our students turn more and more upon themselves and inward, we must react to this problem.

CONCLUSION

Today, the facilitator model is an even more appropriate description of case law than when *Rights and Responsibilities* was published in 1999. The law has taken steps toward adopting a model of shared responsibility for student injury, and placed more burdens on colleges and universities to use reasonable care to protect students from foreseeable danger. The rise of a risk management culture itself shows the viability of the facilitator model as a tool for proactive risk management. There are cases that do not support the themes of *Rights and Responsibilities*; this is no surprise, as the law remains in a transitional moment, although the transition has recently appeared to accelerate.

Students are changing too. Today's college students bring their own unique beliefs, attitudes, and orientations with them. It is already clear to most of us that this generation of students is different from earlier generations. Colleges and universities may be challenged by students who are not as engaged in residential life, civic engagement, and whole life learning as the students who have preceded them. These students also come with a much higher level of wellness needs. *Rights and Responsibilities* was designed to be a model for a transitional period in higher education. In order to get a better perspective on the ultimate success or failure of the facilitator model, it will be necessary to put the book to the test of time. It is still too early to tell where the law will go with the facilitator model.

Rights and Responsibilities was an attempt to create a pragmatic philosophical vision that combines law and principles of higher education. There are some for whom the core intuitions of *Rights and Responsibilities* resonate very deeply; however, there are some intuitions that appear in judicial opinions and elsewhere that are hard to reconcile with the vision. Ultimately, the success of *Rights and Responsibilities* will lie in its ability, or failure, to incorporate intuitions relating to the evolving relationship between students and their colleges or universities.

The law of higher education safety is still very complex. This is a challenging time for administrators and leaders in higher education. The cases suggest that it would be wise to assume that a duty of reasonable care will be owed. Occasionally, a court will be willing to step in and take a case from a jury, but it is hard to predict in advance which cases those will be. The line between the six million dollar settlement in the Krueger matter and the *Freeman* "No-duty" ruling

404. BICKEL & LAKE, *RIGHTS AND RESPONSIBILITIES*, *supra* note 1, at 187–201.

is not so great. The courts are still willing to protect higher education, but higher education is unlikely to receive the kind of protection that keeps serious cases from the courthouse. Duty law in higher education has shifted in a very subtle way. Once, “No-duty” rules in higher education were effectively immunity rules blocking the door to the courthouse; now, “No-duty” arguments are much more like affirmative defense arguments that, at best, will send a case *out* of a courthouse. Instead, protective decisions are now made more frequently on summary judgment because courts want to look around a little bit before they send a case away. Given that cases are now more likely to proceed to discovery and summary judgment, it is sensible to remember that the best defense to any negligence action is still reasonable care. No institution has ever lost a case when it has used reasonable care, which is the one aspect of a *prima facie* case of negligence that is within its power to control. This central message of *Rights and Responsibilities* remains true.

